



The Role of the Inter-American System of Human Rights in the Regulation of Private Military and Security Companies (PMSCs) in Latin America

Antoine Perret

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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This thesis has been submitted for language correction.

Thesis summary:

The use of private military and security companies (PMSCs) is a growing phenomenon in Latin America and the Caribbean, where complex situations are common. Even though the use of PMSCs is not *per se* problematic, the lack of an efficient international and national regulatory framework for PMSCs raises several concerns about the protection of human rights. This study aims first to analyze PMSCs' activities and regulation thereof in conditions in which there is a mix of several types of situation, such as armed conflict and criminal activities or post-disaster and post-conflict. This complexity challenges the identification of the law applicable—international humanitarian law or/and international human rights law—and, thus, challenges the enforcement of any adequate regulation for PMSCs. Three case studies—Colombia, Mexico, and Haiti—illustrate these issues. In Colombia, a non-international armed conflict has been ongoing for approximately fifty years alongside criminal activities linked to drug trafficking. In Mexico, the War on Drugs has escalated to a situation technically classifiable as an armed conflict. Finally, in Haiti, the situation evolved from an armed conflict (2004-2007), to a situation of peace with a high criminal rate before the earthquake (2007-2010), to a post-earthquake disaster situation in which criminality is rising but the intensity of the violence has not reached the level to be classified an armed conflict (2010-present). In order to implement international standards concerning PMSC regulation it is necessary to consider both bodies of law and force territorial states to assume their responsibilities. Considering these elements I then argue that the Inter-American System of Human Rights can play a significant role in improving PMSCs' regulation in Latin America and the Caribbean thanks to its *avant-gardiste* features. Its jurisprudence on non-state actors coupled with its use of external sources to interpret the American Convention on Human Rights would allow the implementation of international norms, including international initiatives on PMSCs, in the region.

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Chapter 1: Introduction

The use of private military and security companies (PMSCs) is a growing phenomenon in Latin America and the Caribbean, much as in the rest of the world. Currently, PMSCs assist international organizations during humanitarian operations, as in Haiti after the massive earthquake in 2010. Meanwhile, other companies are participating in the so-called “War on Drugs,” providing intelligence, logistical support, and training to support the armed forces in countries including Colombia and Mexico. Contractors are also working for private enterprises, such as petroleum companies, providing security services in risky situations all around the region, as well as private individuals, as security guards, kidnapping consultants, and more.

Though often referred to as “private security companies,” “military provider firms,” and “corporate mercenaries,” the “private military and security companies” label is predominant and preferable. The main interest in using this terminology is that it encompasses the variety of services provided by the companies; for example, armed or unarmed guarding, protection of persons and assets, security and military training, security audits, risk mitigation, anti-piracy services, prisoner detention and interrogation, demining, security sector reform programs, intelligence, disaster relief services, and kidnap and ransom services.¹

Examining this list of services makes clear that non-state actors are now allowed to engage in activities that were once the primary domain of states. However, the regulatory framework and the mechanisms of control and accountability have not adapted to address this phenomenon due to its novelty and constant evolution. As a result, existing laws and legal systems are ill equipped to address PMSCs’ violations of human rights. From a doctrinal standpoint, the responsibility of private actors for human rights violations is in question under the law of many jurisdictions. Furthermore, the development of regulations complementary to human

¹ PMSCs have been defined as “corporations offering security, defense and/or military services to states, international organizations, nongovernmental organizations, and private companies and/or armed groups. These services include armed guarding and protection of persons and objects or buildings, maintenance and operation of weapons systems, prisoner detention and interrogation, intelligence, risk assessment and military research analysis, as well as advice to or training of local forces and security personnel.” In F. Francioni and N. Ronzitti, (eds) *War by Contract* (London: Oxford University Press, 2011), at 1.

rights law that specifically address PMSCs has been slow; even once they are developed, most such regulations will be of a non-binding character.

The need for more regulation of PMSCs

The use of PMSCs is not problematic *per se*²: international law does not require that security be provided by public entities. However, the provision of security services may imply use of force, thus raising the probability of human rights violations. Indeed, there is “a plethora of examples in which private security ‘solutions’ have turned out to be worse than the threat they were employed to resolve. This is particularly the case when there is an absence of adequate control and oversight or where accountability structures are weak or inexistent.”³ States and society have a common interest in regulating PMSCs because a “*well-regulated* private security sector can in cooperation with the police act as a ‘force multiplier’, increasing the overall sense of security.”⁴

In general, PMSCs’ contractors are not less well-trained or more violent than soldiers.⁵ The main difference between soldiers and PMSCs’ contractors is whether they are subject to mechanisms of accountability. Military activities are subject to public and parliamentary oversight; that is, mechanisms of accountability exist to respond in the event that a soldier

² Y. Sandoz, ‘Private Security and International Law’, in J. Cilliers and P. Mason, (eds) *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (Pretoria: Institute for Security Studies, 1999), 201–226, at 210.

³ B. Buckland and T. Winkler, *Public Private Cooperation: Challenges and Opportunities in Security Governance*, Geneva Center for the Democratic Control of Armed Forces (DCAF), Horizon 2015 Working Paper No. 2 (2010), at 10.

⁴ R. Abrahamsen and M. C. Williams, ‘Security sector reform: bringing the private’, 6 (1) *Conflict, Security & Development* (April 2006), at 17. Emphasis added.

⁵ For instance, soldiers in Latin America and the Caribbean have demonstrated great capacity to violate human rights. See for instance the scandals over extrajudicial killings by the Colombian army during the Uribe administration. Human Rights Watch, *World Report 2011, Chapter Colombia*, (2011), available at <http://www.hrw.org/world-report-2011/world-report-2011-colombia>; Human Rights Watch, *The “Sixth Division”, Military-paramilitary Ties and U.S. Policy in Colombia*, (2001), available at <http://www.hrw.org/legacy/reports/2001/colombia/6theng.pdf>; Human Rights Watch, *Colombia’s Killer Networks, The Military - Paramilitary Partnership and the United States*, (1996), available at <http://www.hrw.org/legacy/reports/1996/killertoc.htm>.

were to violate human rights, and the justice system should be able to process the responsible party.⁶ This is not the case for PMSCs.

Existing oversight mechanisms are mostly adapted to the case in which force is used by the public sector, not by private actors. “The current privatization and outsourcing of military services challenges these mechanisms. It is not simply a different way of providing security; it has serious implications for the democratic control of the use of armed force.”⁷ Furthermore, “the very existence (and growing role) of a private dimension within an evolving security network is not yet fully recognized and understood by political and parliamentary oversight bodies, let alone by the wider public.”⁸ In other situations, states do not have the capacity—or the will—to control PMSCs’ activities, particularly when PMSCs are hired at the international level.

The mechanisms of control and regulation can be improved at three different levels: 1) at the international level, by developing coherent norms and implementing existing standards, 2) at the national level, by modifying—when necessary—the domestic legislation, and 3) at the industry level, by improving self-regulation.⁹

At the international level there are specific international initiatives for the regulation of PMSCs’ activities. The Swiss government and the International Committee of the Red Cross prepared the first international initiative: the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, which was initially endorsed by seventeen countries.¹⁰ The UN Working Group on Mercenaries proposed the second international

⁶ See for instance: P. D. Feaver, ‘The Civil-Military Problematic: Huntington, Janowitz, and the Question of Civilian Control’ 23 *Armed Forces & Society* Winter (1996), 149-178.

⁷ E. Krahmann, *States, Citizens and the Privatization of security* (New York: Cambridge University Press, 2010), at. 2.

⁸ B. Buckland and T. Winkler, *supra* note 3, at 11.

⁹ J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry* (New York: International Peace Institute, 2009), at 19.

¹⁰ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict [hereinafter the Montreux Document], (September 2008) available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20%28e%29.pdf>; see also <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>

initiative: Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council in September 2010.¹¹

However, as analyzed in Chapter Two, this body of regulation is not binding and is considered fragmented. These initiatives are thought by some to be “failing to address the interests and needs of third parties, such as the communities from which PMSC personnel are recruited, or the communities in which they conduct their operations, or victims of violations committed by PMSCs.”¹² Furthermore, there is no regulation directly binding on private corporations, which means that states are entirely responsible for enforcing international standards.¹³

The international standards concerning human rights obligations can be found in the different existing human rights treaties. Chapter Three focuses on human rights obligations of the two main subjects of the international system—states and international organizations. However, sometimes states do not implement their obligations at the national level. Political will to effectively regulate PMSCs is often absent and the administrative resources available for this task are often insufficient. Domestic legislation is frequently outdated and does not take into account the contemporary realities of PMSCs’ activities, particularly their transnational components.¹⁴ As a result, these laws fail to provide functional guidance to companies.¹⁵ Thus, various factors undermine the utility of national regulations in reducing violations of international human rights and international humanitarian law.¹⁶ Regardless of the cause, inadequate regulation of PMSCs is contrary to human rights obligations.¹⁷

¹¹ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Prepared by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination [hereinafter Draft Convention], available in Annex of United Nations, Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, July 2, 2010, A/HRC/15/25, available at <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>.

¹² J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry*, *supra* note 9, at 20.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The inadequate regulation of PMSCs often leads to human rights violations which illustrate failures to abide by human rights obligations. The duty to prevent (see discussion on states’ obligations below in Chapter Three, at 42-48) means that the inadequate regulation itself is problematic if/when states know, as they should, that PMSCs could present a threat to human rights.

Failing to fulfill human rights obligations gives rise to international responsibility for subjects of the international system. Chapter Four discusses the mechanisms of attribution of wrongful acts to both states and international organizations. As states' responsibility can arise from any action of a state official or organ, and international organizations' responsibility by the conduct of its organs or agents, hiring PMSCs can, under certain circumstances, give rise to international responsibility for a wrongful act by these PMSCs.

The third level at which mechanisms of control and regulation can be improved is at the corporate level, such as with self-regulation.¹⁸ Self-regulation is usually seen as inappropriate to deal with serious violations of human rights and international humanitarian law.¹⁹ Similarly, self-regulation is often inadequate for monitoring companies' activities because initiatives are often created from the viewpoint of the companies, without the input of those affected by PMSCs' activities.²⁰ More generally, and as analyzed in Chapter Five, self-regulation shows its limits in complicated situations, which is common in the case of PMSCs' activities.

Considering the doubtful impact of self-regulatory initiatives in the absence of more state involvement therein, the deficiency of national regulation, and the existence of international standards without reach at the national level, there is a need for a mechanism to implement the existing standards and to force states to assume their responsibilities. The regional level—particularly the Inter-American System of Human Rights—is pertinent to address these issues and increase control over PMSCs in the region.²¹

¹⁸ In the context of PMSCs, self-regulation often refers to corporate social responsibility, which can be defined as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.” In European Commission Green Paper, Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366, 6, § 20 available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf

¹⁹ J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry*, *supra* note 9, at 19.

²⁰ *Ibid.*

²¹ In this sense this thesis benefecy from the experience of the PRIV-WAR research project on how the European Union could contribute to ensuring better compliance of PMSCs with human rights and international humanitarian law. See more detail on this research project and it recommendations in Chapter Two, page 40.

A regional approach to improve control and accountability of PMSCs: the case of Latin America and the Caribbean

While the use of PMSCs worldwide raises concerns, their use in Latin America and the Caribbean creates additional concerns because of the weak rule of law—that is, the uneven and inconsistent application of the law—in the region.²² Furthermore, PMSCs’ activities in Latin America and the Caribbean continue a long tradition of challenges posed by private armed groups to the state monopoly on the use of force.

In many Latin American nations, there has been a long-standing tension between the state’s attempts to consolidate a monopoly on the use of force, and the reality of a proliferation of private armed groups, which are sometimes formed with the state’s blessing. The tension consists, on one side, of the tradition of guerrillas, paramilitaries, “self-defense” groups, gangs and cartels; and on the other side, decades of U.S.-funded “military professionalization” aimed at strengthening the military’s monopoly on force and bringing it under the control of civilian institutions.²³

At present, PMSC regulations are not sufficiently developed in Latin America and the Caribbean at either the international or national level to effectively control PMSCs; thus,

²² The concept and definition of rule of law have been subject to extensive academic debate. Rawls used a thin definition: “the impartial and regular administration of rules, whatever these are.” in J. Rawls *A Theory of Justice*. (Cambridge, MA: Belknap Press, 1971) at 235. A more complete definition could be: “the rule of law is prevalent to the extent that regulated interactions among citizens or between them and the state are structured by (that is, predictable according to) preexisting rules that have the status of law within that political system.” In D. Brinks and S. Botero, *Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies*, paper presented at the American Political Science Association Meeting, Washington, D.C. September 2010, available at <http://kellogg.nd.edu/odonnell/papers/brinks.pdf>; The definition used by the UN is also relevant: “It [the rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” In UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, (August 23, 2004), available at <http://www.unrol.org/files/2004%20report.pdf>. On the measurement of the indicator ‘rule of law’ see D. Kaufmann, A. Kraay, and M. Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues*, World Bank Policy Research Working Paper No. 5430, (September 2010) available at SSRN: <http://ssrn.com/abstract=1682130>; See also D. Kaufmann, A. Kraay, and M. Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004*, World Bank Policy Research Working Paper No. 3630 (May 2005) available at <http://ssrn.com/abstract=718081>.

²³ K. McCoy, ‘Yesterday’s Civil Warriors, Today’s Global Guards: Latin Americans in the Privatized Military Industry’, in A. Perret, (ed), *Mercenarios y Compañías Militares y de Seguridad Privadas: Dinámicas y Retos Para América Latina*, (Bogotá: Universidad Externado de Colombia, 2010), 141-162, at 154-155.

improvements to the regulatory framework and its implementation would benefit both states and society.

The rule of law is often weakened in situations of armed conflict, post-conflict, post-disaster, and violence,²⁴ such as the armed conflict in Colombia, the War on Drugs in Mexico, and the post-disaster situation in Haiti.²⁵ These legal deficiencies further reduce states' ability to control PMSCs' activities and have produced the concrete effect of permitting human rights violations perpetrated by PMSCs to remain unpunished. In other words, PMSCs function so freely in Latin America and the Caribbean because the rule of law—both domestic, in general, and international, regarding PMSCs in particular—is inadequate.

To further the objective of preventing human rights violations, as well as improving transparency and accountability, regulation of PMSCs must be improved. Given the domestic challenges and the transnational character of the phenomenon, multilateral cooperation is necessary to effectively regulate PMSCs; however, as mentioned above, international regulatory efforts operating on a global scale are still under debate, and their construction and implementation will take time. The step between the national and international levels—the regional level—can play this role because, “[t]he relatively greater cultural and ideological homogeneity of a region may permit agreement on a fuller list of human rights, or their more detailed definition, than the ‘universal’ processes have achieved.”²⁶ In Latin America there is

²⁴ See for instance R. H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse”, 97 *Columbia Law Review* (1997). However, as noted by Rosa Ehrenreich Brooks, law, order, and violence are not always causally linked: there are situations of order without law, and situations where there law and violence coexist. See R. Ehrenreich Brooks, ‘The New Imperialism’, 101 (7) *Michigan Law Review* (June 2003).

²⁵ On the rule of law in Latin America see D. Brinks and S. Botero, ‘Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies’, paper presented at the American Political Science Association Meeting, Washington, D.C. September 2010, available at <http://kellogg.nd.edu/odonnell/papers/brinks.pdf>. See also G. O’Donnell, ‘The Quality of Democracy: Why the Rule of Law Matters’, 15 (4) *Journal of Democracy* (October 2004). See also: United Nation Development Program, *Regional Human Development Report 2013-2014 Citizen Security with a Human Face. Evidence and Proposals for Latin America* (2013); and Crime in Latin America, A Broken System’, *The Economist*, July 12, 2014, available at <http://www.economist.com/news/americas/21606864-citizens-security-regions-biggest-problem-time-improve-criminal-justice-broken>

²⁶ G. L. Neuman, ‘Import, Export, and Regional Consent in the Inter-American Court of Human Rights’, 19 *The European Journal of International Law (EJIL)* (2008), at 106. In this study, I take a cultural approach in the sense that I recognize the “greater cultural and ideological homogeneity of a region” explained by G. L. Neuman [*Ibid.*] and not in the sense defined in the Clash of Civilization [S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, (New York: Simon & Schuster, 1996)]. The regional approach is based on the concept of “regionalism” which “implies a policy whereby states and non-state actors cooperate and coordinate strategy within a given region. [...] The aim of regionalism is to pursue and promote common goals in one or

also an efficiency gain in this approach: a regional system of human rights protection, the Inter-American System of Human Rights, has emerged during the second half of the twentieth century and positioned itself as a key player in the promotion of human rights and rule of law in the region.

As described in Chapter Six, the Inter-American System of Human Rights is based on two main documents: the Declaration of the Rights and Duties of Man, adopted in 1948, and the American Convention, adopted in 1969. It is composed of two institutions: the Inter-American Commission on Human Rights, located in Washington DC, and the Inter-American Court of Human Rights based in San Jose (Costa Rica). The jurisprudence of the Court is considered *avant-garde* (legally non-conformist) because it tends to interpret its own jurisdiction broadly, not limited by the principle of state voluntarism. The Inter-American jurisprudence is also very appropriate for the topic of PMSCs because it has, on many occasions, addressed activities of non-state actors and state responsibility concerning those actors.²⁷

Thus, on the one hand, Latin America and the Caribbean benefit from the existence of a relatively well-respected regional system of protection of human rights. Yet on the other hand, there is the lack of control and regulation of PMSCs in Latin America and the Caribbean illustrated in the cases of Colombia (Chapter Seven), Mexico (Chapter Eight), and Haiti (Chapter Nine). The question that emerges is: what is the capacity of this regional system to improve the situation of control of PMSCs?

The main argument of this study, developed in Chapter Ten, is that the Inter-American System of Human Rights can play a significant role in improving the regulation and control of PMSCs in Latin America and the Caribbean by implementing international norms, including the international initiatives on PMSCs. To illustrate this argument, I will discuss the lack of control and regulation of PMSCs in three countries in Latin America that have ratified the

more issue areas. Understood thus, it ranges from promoting a sense of regional awareness or community (soft regionalism), through consolidating regional groups and networks, to pan- or subregional groups formalized by interstate arrangements and organizations (hard regionalism).” in L. Fawcett, ‘Exploring regional domains: a comparative history of regionalism’, *International Affairs*, 2004, 429-446, at 433.

²⁷ The most relevant decisions concerning non-state actors are: *Case of Mapiripán Massacre v Colombie*, Inter-American Court of Human Rights [hereinafter IACtHR] (September 5, 2005), Series C No. 134; and *Case of Pueblo Bello Massacre v Colombia*, IACtHR (January 31, 2006), Series C No. 140.

American Convention and accepted the jurisdiction of the Inter-American Court of Human Rights.

Case study selection

During the last decade, analyses of the PMSC phenomenon have been on the rise,²⁸ on topics including comparisons of PMSCs with mercenaries²⁹ and PMSCs' effect on the public control of security.³⁰ Furthermore, the role of human rights and humanitarian law to regulate PMSCs has been investigated through the Priv-War research project.³¹ Nevertheless, the interest in and knowledge about PMSCs' activities in Latin America and the Caribbean is often lacking. There are no in-depth comprehensive studies on the phenomenon in this part of the world.³² This can be explained by the novelty of the phenomenon and the less well-publicized incidents involving PMSCs in this region.³³ Furthermore, PMSCs' activities in Latin America are less related to combat and, thus, less controversial.

²⁸ See for instance: P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 52; D. Avant, *The Market for Force: The Consequences of Privatizing Security*, (New York: Cambridge University Press, 2004); D. Isenberg, *Shadow Force: Private Security Contractors in Iraq*, (London: Praeger, 2009); E. Krahmann, *supra* note 7.

²⁹ S. Chesterman and C. Lehnardt, (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (New York: Oxford University Press, 2007).

³⁰ S. Chesterman and A. Fisher, A. (eds), *Private Security, Public Order: The Outsourcing of Public Services and its Limits*, (New York: Oxford University Press, 2009).

³¹ See F. Francioni and N. Ronzitti, *supra* note 1; C. Bakker and M. Sossai, (eds) *Multilevel Regulation of Military and Security Contractors, The Interplay between International, European and Domestic Norms*, (Oxford: Hart Publishing, 2012). On PMSCs and international law, see also L. Cameron and V. Chetail, *Privatizing War Private Military and Security Companies under Public International Law* (Cambridge: Cambridge University Press, 2013).

³² Some examples of these studies are: P. Arias, *Seguridad privada en América Latina: el lucro y los dilemas de una regulación*, (Santiago, Chile: Flacso, 2009); A. Perret, *Las Compañías Militares y/o de Seguridad Privadas en Colombia: ¿Una nueva forma de mercenarismo?* (Bogotá: Universidad Externado de Colombia, 2009); O. Argueta, *Private Security in Guatemala: Pathway to its Proliferation* (Hamburg: Nomos Publishers, 2013).

³³ Nothing comparable to the Nissour square events in Iraq, where contractors killed 17 civilians, or the Abu Ghraib tortures happened in Latin America. On Iraq, see for instance: N. Rosemann, 'The Privatization of Human Rights Violations Business Impunity or Corporate Responsibility? The case of human rights abuses and torture in Iraq', *Nebula* (2005); see also, 'Will Iraq's government dare dispense with the West's private armies?', *The Economist* (September 2007) at 20; C. Lesnes, 'La société Blackwater impliquée dans une fusillade à Bagdad', *Le Monde* (September 19, 2007). On Abu Ghraib torture see M. Bina, 'Private military contractor liability and accountability after Abu Ghraib', 38 *John Marshall Law Review* (2005) at 1237; H. Carney, 'Prosecuting the lawless: Human rights abuses and private military firms', 74 *George Washington Law Review* (2006) at 317.

One of the objectives of this study is to fill this gap. However, this study does not aim to be an exhaustive analysis of the situation of PMSCs in all countries in the region. Rather it aspires to illustrate the different existing challenges concerning PMSCs in the region and the impact of their activities on human rights.

The two principal conditions to examine PMSCs' activities in Latin America and analyze the potential role of the Inter-American System of Human Rights are 1) PMSCs must be legally active in the country, and 2) the country must have ratified the American Convention and accepted the jurisdiction of the Inter-American Court of Human Rights. The former is necessary because regulation only applies to legally-operating organizations, while the latter is critical because the effectiveness of the Inter-American System depends in part on its jurisdiction. Furthermore, two additional criteria are helpful to have a complete picture of the phenomenon: who contracts PMSCs and in what kind of situation they operate. PMSCs are contracted by different kinds of clients, including states, international organizations, non-governmental organizations (NGOs), private companies, and private individuals. Furthermore, they work in all kinds of situations including armed conflict, internal tensions, peace operations, humanitarian assistance, and in situations of peace where state presence is lacking.

Three countries in Latin America and the Caribbean—Colombia, Mexico, and Haiti—capture all of these criteria, with important variation among the elements. The situation in each of these three countries is complex with multinational and national PMSCs active in each context. The three of them have ratified the American Convention and accepted the jurisdiction of the Inter-American Court. As discussed below, the situation in Colombia is a non-international armed conflict and international humanitarian law applies in the majority of the territory. In Colombia, PMSCs work for states—both Colombia and the US—and for private actors. In Mexico, PMSCs work also mainly for states—the Mexican and US states. However, the context is different—a law enforcement initiative has reached the point of being classifiable, in certain parts of the territory, as an armed conflict. Thus, international humanitarian law applies in a very limited part of the country; meanwhile, international human rights law is the main body of law applicable. In Haiti, even though the UN stabilization mission started in 2004, the situation remains complex, with several armed groups still active,

and the earthquake in 2010 added another element of complexity. PMSCs in Haiti work for an international organization, states, and non-governmental organizations.

The analysis of these three case studies aims to elucidate the situation in order to characterize the specific threats and challenges presented by the use of PMSCs in the national context, as well as to identify the applicable law, which has an impact on the control and regulation of PMSCs. The classification of the situation is also important for identifying the potential limitations on the application of the American Convention on Human Rights. Following the examination of the situation and the applicable law, I will consider PMSCs' activities and the state of control and regulation in each case in order to identify the regulatory gaps. Finally, I will focus on the Inter-American System of Human Rights and analyze its jurisprudence with the objective of demonstrating its prospective role in improving the currently deficient control and regulation of PMSCs in Latin America and the Caribbean.

Method

Considering the main objective of this thesis—to analyze the role of the Inter-American System of Human Rights in improving PMSCs' regulation—I use a traditional approach based on the analysis of legal rules and judicial practice at both international and regional levels. First, I discuss and analyze the existing international norms related to PMSCs' activities. Then, I examine the situation and PMSCs' activities and regulations in my three case study countries in order to evaluate the application of the existing law. Finally, I analyze the practices of the Inter-American System of Human Rights, with the objective of demonstrating the potential role of this regional system of protection of human rights to improve the regulation and control of PMSCs in Latin America and the Caribbean.

In order to develop the three case studies and illustrate the argument, a combination of methods will be used. After an analysis of the legal framework applicable to the phenomenon of PMSCs, the study will use an area studies approach with a focus on three case studies from

the region.³⁴ The use of case studies in order to examine the phenomenon of PMSCs, which is recent and complex, demonstrates its realities and existing challenges. The regional approach is particularly useful at the moment of facing a new phenomenon that is highly adaptable to different contexts and, thus, needs a more specific approach than an international one. Indeed, with regional analysis may come a regional solution: regional-level mechanisms are the preferable step between international and national levels, as they retain the international component necessary to respond to transnational challenges such PMSCs yet are closer to domestic legislation.

However, the use of PMSCs is still lacking of transparency, and what limited information is available is qualitative, rather than quantitative.

Case studies are generally strong precisely where statistical methods and formal models are weak [...] for strong advantages of case methods: their potential for achieving high conceptual validity; their strong procedures for fostering new hypotheses; their value as a useful means to closely examine the hypothesized role of causal mechanisms in the context of individual cases; and their capacity for addressing causal complexity.³⁵

In this study I follow the “new empirical turn in international legal scholarship”³⁶ which recognizes the added value of applying this methodological approach, more common in the social sciences, in law. It recognizes that:

[a] legal analysis must take on the complexities of the empirical reality and at every turn fold them into the doctrinal analysis, if it is to get beyond a simple Panglossian view of the world—if it is to avoid being relegated to the long list of discarded utopian projects that litter the past of international law.³⁷

The qualitative approaches offers the “advantage of paying closer attention to dynamic social

³⁴ On the methodology and interest of area studies, see M. Basedau, and P. Köllner, *Area Studies and Comparative Area Studies: A Primer on Recent Debates and Methodological Challenges*, GIGA German Institute of Global and Area Studies, available at http://www.giga-hamburg.de/sites/default/files/openaccess/japanaktuell/2007_2/giga_jaa_2007_2_basedau_koellner.pdf

³⁵ A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: MIT Press, 2005), at 19.

³⁶ G. Shaffer and T. Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, 106 *American Journal of International Law* (2012) 1-46, at 1.

³⁷ T. Carothers, ‘Empirical Perspectives on the Emerging Norm of Democracy in International Law’, 86 *Proceedings of the Annual Meeting American Society of International Law* (April 1-4, 1992), at 266–67.

contexts, as it often involves fieldwork and interviews”³⁸ and

fundamentally depends on watching people in their own territory and interacting with them in their own language, on their own terms. As identified with sociology, cultural anthropology, and political science, among other disciplines, qualitative research has been seen to be ‘naturalistic,’ ‘ethnographic,’ and participatory.³⁹

Three main methods are used to collect data in qualitative research: direct observation, in-depth interviews, and document analysis.⁴⁰ There is a need for “different kinds of data from different sources to see whether they corroborate each other.”⁴¹ Thus, for this research, numerous interviews were completed during the course of research trips in the case study countries. Interviewees were experts, activists (NGOs), public officials, and PMSC employees. The diversity of the actors interviewed and the use of “a process of triangulation” to compare the information helped “to limit [...] the normative predispositions of the author.”⁴²

Part of the research on Colombia was conducted prior to the official start of the PhD in 2010. I conducted research on PMSCs’ activities in Colombia between 2006 and 2009 and also made a field research trip during the months of July and August 2011. Since then, I have conducted several additional interviews by phone. A research trip to Mexico was completed during the summer of 2012, and several interviews with Mexican experts and PMSCs’ managers working in Mexico took place in Washington, DC between October 2012 and December 2013. Unfortunately, I did not have the opportunity to carry out research in Haiti; however, I

³⁸ G. Shaffer and T. Ginsburg, *supra* note 36, at 4.

³⁹ J. Kirk and M. L. Miller, *Reliability and validity in qualitative research*, (Beverly Hills: Sape Publication, 1986) at 9. See also M.W. Bauer, ‘Classical Content Analysis: A Review’, in M.W. Bauer, G. Gaskell, and N.C. Allum (eds), *Qualitative Researching with Text, Image and Sound: A Practical Handbook*, (London: Sage Publications, 2000).

⁴⁰ L. Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford : Oxford University Press, 2010), at 928. For a discussion, see T. May, *Social Research: Issues, Methods and Practices* (2nd edn., Buckingham: Open University Press, 2001), at 138–73; K. Punch, *Introduction to Social Research* (London: Sage Publications, 1998) at 139–68; or M.Q. Patton, *Qualitative Research and Evaluation Methods* (3rd edn. London: Sage Publications, 2002) at 4–5.

⁴¹ D. Walsh, ‘Doing ethnography’, in C. Seale, (ed) *Researching society and culture* (London: Sage publication, 1997), 217-233, at 231.

⁴² G. Shaffer and T. Ginsburg, *supra* note 36, at 4.

conducted several interviews by phone and exchanged emails with experts, practitioners (humanitarian workers), and former PMSCs' employees, all of whom have worked in Haiti.

Other interviews with experts took place at conferences on PMSCs, such as the regional workshop for Latin America for the promotion of the Montreux Document in Santiago, Chile in May 2011; a workshop on PMSCs in San Remo, Italy in October 2011; and the diplomatic conference "Montreux + 5" in December 2013 in Montreux, Switzerland.

Finally, several visits to Geneva provided the opportunity to conduct interviews with experts involved in the Swiss initiative, including employees of the Geneva Center for the Democratic Control of Armed Forces (DCAF) who were responsible for the preparation of the Code of Conduct, as well as members of the UN Working Group on the Use of Mercenaries involved in the preparation of the United Nations Draft Convention on PMSCs.

For each case study, it was necessary to pay special attention to evaluating the intensity of the violence—an essential element for classifying the situation as an armed conflict.⁴³ However, "[d]ata collection and monitoring trends in countries affected by armed conflict is a difficult task."⁴⁴ On the one hand, the indirect effects of conflict-related violence on the population are frequently underreported.⁴⁵ And on the other hand "[b]eyond the physical risks and the difficult access to the sources of the data, there are risks of manipulation by those entrusted with the production of such data."⁴⁶ Thus, "[w]hether focusing on the global or the national level, a comprehensive estimate of lethal violence necessarily relies on multiple data sources."⁴⁷

⁴³ Two conditions are required to classify a situation as an armed conflict; see a detailed discussion on this topic in Chapter Eight on Mexico at page 160 of this thesis.

⁴⁴ A. Alvazzi del Frate, N. Jaynes, R. Murray, M. Nowak, and I. Pavesi, 'Tools for measurement, monitoring and evaluation: Sources of conflict, crime and violence data', February 19, 2013, at 21, available <http://www.smallarmssurvey.org/fileadmin/docs/M-files/CCRVI/CCVRI-Practice-Product-Sources-of-Data.pdf>

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*; "In the best case, data is integrated into a national vital registration system that codes the causes of deaths according to the International Classification of Disease (ICD), currently in its tenth revision (WHO, n.d.a). At the international level, national data is aggregated through systems such as the World Health Organization's Mortality Database (WHOMDB), the single largest dataset on causes of death reported by national vital registration systems." In E. Gilgen, 'Trends and Patterns of Lethal Violence', in *Global Burden of Armed Violence 2011: Lethal Violence* (Cambridge: Cambridge University Press, 2011), at 48.

⁴⁷ E. Gilgen, *Ibid.*, at 44.

Concerning Colombia and Mexico, the data are considered reliable.⁴⁸ Furthermore, Colombia facilitates the evaluation because, as the government recognized the armed conflict, the collection of data differentiates between victims of the armed conflict and other.⁴⁹ This is not the case in Mexico, where the government considers its fight against drug trafficking organizations as a law enforcement initiative. Haiti is more complicated still because there is a serious lack of information, partly due to the lack of capacity of the state.⁵⁰ For the cases of Colombia and Mexico, I compiled a variety of publicly available data into a table (Appendices I and II) in order to provide a more complete picture of the situation of violence in each one. Due to the lack of data on fatalities and violence in Haiti, I collected data about small weapons and their distribution among the different actor in presence in order to evaluate their military capacity. Appendix III assembles those data on small weapons for Colombia, Mexico, and Haiti in order to compare the three situations.

In deploying the qualitative method, I aim to illustrate and evaluate the activities of PMSCs and the situations in which they operate in Colombia, Mexico, and Haiti.

The study also includes more traditional legal analysis of domestic laws, international treaties, and jurisprudence at different levels. The Inter-American System of Human Rights and its progressive jurisprudence are a significant focus of this analysis. The Inter-American Commission and Court have taken exacting stances regarding non-state actors, been cutting-edge in their use of external sources to interpret the American Convention on Human Rights, and obligated states to modify domestic legislation if necessary. With these characteristics, the Inter-American System of Human Rights has shown itself to be a potentially promising ally in the implementation of international standards concerning the regulation of PMSCs in Latin America and the Caribbean.

⁴⁸ Interview with Matthias Nowak, Associate Researcher at the Small Arms Survey, Bogota (February 19, 2014). Even during the time President Uribe did not recognize the existence of the armed conflict, data collection continued differentiating between armed conflict-related fatalities and other crime-related deaths.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

Part 1: International framework

The phenomenon of PMSCs was preceded by a long practice of use of private actors in war. However, as discussed first in this part, in Chapter Two, the international regulatory framework has not been adapted to face the challenges posed by PMSCs' activities. This is the case even though states and international organizations (IOs) have both obligations and responsibilities related to PMSCs' activities, discussed in Chapter Three and Four. Finally Chapter Five concentrates on the limitations of PMSCs' direct obligations and responsibilities at the international and national levels. It also examines the progress made at the international level, analyzing several corporate responsibility initiatives.

Chapter 2: International regulatory gap

Private agents have been active in wars since the beginning of war history. Over time, the regulation of the use of force evolved to limit some activities of private agents, such as pirates or mercenaries, in war. Furthermore, there were movements, of varying success, to prohibit these actors, which are considered by some to be the precursors of modern-day PMSCs. But the emergence of the PMSC phenomenon has not been accompanied by an effective adaptation of the regulatory framework concerning private actors in war, as occurred to address its predecessors. This chapter analyzes first the history and evolution of the use of force by private actors with the objective of understanding the emergence of PMSCs. The second part focuses on the international community's response to the challenges posed by PMSCs and analyzes the two main international initiatives that aim to improve the PMSCs' regulation. However, this chapter concludes that the existing international framework does not regulate PMSCs to a satisfactory degree.

2.1 The evolution of private use of force: from mercenaries to PMSCs

2.1.1 The origins and development of mercenarism

Since war literature has existed, references to the use of private agents to perform tasks related to security are common and constant. The first recorded use of “a professional soldier being hired to serve in a foreign army”⁵¹ occurred during the reign of King Shulgi de Ur (2094-2047 BC),⁵² and since then, there has been an abundant use of mercenaries in many civilizations. For instance, at the Battle of Kadesh in 1294 BC, the army of Ramses II was mainly composed

⁵¹ Definition of “mercenary”, Oxford dictionary, <http://www.oxforddictionaries.com>.

⁵² P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28.

of mercenaries.⁵³ Similarly, many Greek mercenaries were present in most European battles between the seventh and sixth centuries BC.⁵⁴ In 334 BC, mercenaries were a fundamental force, representing one-third of Alexander the Great's army during the invasion of Persia.⁵⁵

The different systems of government—from city-states to empires—depended on “free soldiers,” as mercenaries were sometimes called, at times to their own detriment. For instance, mercenaries recruited by the Carthaginian Empire attacked it at the end of the First Punic War (264-241 BC) because the Empire could not pay them.⁵⁶

Mercenarism expanded during the medieval period because political leaders allowed the privatization of violence.⁵⁷ Mercenaries were indispensable because they were more qualified than regular soldiers.⁵⁸ Italian cities were the first in this period to use military units under contract;⁵⁹ for instance, the city of Venice hired soldiers to fight in the Crusades (1095-1270).⁶⁰ In many ways, the proliferation of private military companies coincided with unstable situations. This is because a lack of centralized power incentivized the creation of these companies.⁶¹ The Hundred Years' War (1337-1453) illustrates this point: once the war was over, the former soldiers found themselves unemployed and often homeless, but then they became mercenaries and formed military companies.⁶²

Unlike mercenaries from antiquity, the mercenaries of the Middle Ages were organized into autonomous companies. “Free companies”—large institutionalized groups of mercenaries—played an important role in protecting the European city-states, allowing the citizens to

⁵³ T. S. Millard, ‘Overcoming post-colonial myopia: a call to reconize and regulate Private Military Companies’, 176 *Military Law Review* (2003) 1-95, at 2.

⁵⁴ M. Lee Lanning, *Mercenaries, Soldiers of Fortune, from Ancient Greece to Today's Private Military Companies*, (New York: Ballantine Books, 2005) at 13.

⁵⁵ T. S. Millard, *supra* note 53, at 2.

⁵⁶ P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28, at 21.

⁵⁷ J. E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Ewing: Princeton University Press, 1994).

⁵⁸ P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28, at 26.

⁵⁹ P. W. Singer, ‘Un métier vieux comme le monde’, *Le Monde Diplomatique*, (November 2004), at 24-25.

⁶⁰ *Ibid.*

⁶¹ P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28, at 23-24.

⁶² See C. Hoppe, *Passing the buck: state responsibility for the conduct of private military companies* (PhD Thesis on file at the European University Institute, Florence, 2009), Chapter 1.

concentrate their efforts on prospering.⁶³ Mercenary troops were better disciplined than and militarily superior to feudal troops; the “Swiss companies” that became famous because of their excellent fighting capacity are illustrative of this period.⁶⁴

2.1.2 The decline of mercenarism

With the construction of the modern state after the end of the Thirty Years’ War and the Peace of Westphalia in 1648, the concept of sovereignty prevailed over the concept of classical empire.⁶⁵ At this time, only three types of private players were still allowed to use force: corsairs, mercantile companies—for instance, the English East India Company and the Dutch East India Company—and mercenaries.⁶⁶ However, these actors were challenging the sovereignty of states. Thus, during the process of the institutionalization of the state, the private players were delegitimized in different ways, depending on how they were challenging state power.⁶⁷

The main problem posed by corsairs and their pirate activities was who should be accountable for their actions. The tensions created by their activities were international—between the states affected by this practice and those that promoted it. States such as France, England, and Holland used corsairs in order to perform the work that their naval forces were unable or not permitted to do—for example, to loot Spanish and Portuguese colonial territories.⁶⁸ Ultimately, European states negotiated an end to this practice and signed the Paris Declaration Respecting Maritime Law in 1856, establishing the law of the sea in time of war and banning corsairs and privateers.⁶⁹

Similar to corsairs, mercantile companies, which states used to develop long-distance

⁶³ P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28, at 26.

⁶⁴ *Ibid.*, at 26.

⁶⁵ *Ibid.*, at 35. Such as the Roman Empire.

⁶⁶ J. E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, *supra* note 57, at Chapter 2.

⁶⁷ *Ibid.*

⁶⁸ J.-F. Perron, ‘Flibustiers corsaires et pirates: l’impact de leurs actions sur le déclin de l’Empire espagnol d’Amérique au XVIIe siècle’ (Chicoutimi: Université du Québec à Chicoutimi, 2001)

⁶⁹ Paris Declaration Respecting Maritime Law of 16 April 1856.

commerce and establish new colonies, also caused problems at the international level. These companies had various sovereign powers such as “the right to have [their] contracts treated as international treaties and the right to make war.”⁷⁰ They were also authorized to issue currency, govern territories, and maintain standing armies.⁷¹ They created tensions between their home states when they engaged in conflict; this occurred, for instance, between the English East India Company and French forces in India during the seventeenth century.⁷² Home states attempted to remedy this problem by divesting mercantile companies of their privileges.⁷³ Eventually, this caused mercantile companies to go bankrupt and disappear.⁷⁴

Meanwhile, the third type of private player permitted to use force—mercenaries—was used at the domestic level by states to escape the slow pace of the military feudal system.⁷⁵ Despite strong criticisms—Machiavelli, for example, accused mercenaries of being dangerous for leaders because the mere financial incentive was insufficient for fighters’ sacrifice—the use of mercenaries continued.⁷⁶ “The paradox was [...] that no one wanted to hire mercenaries, but everyone had to – or lose the war.”⁷⁷ The prohibition on mercenarism came only with the centralization of power into state entities.⁷⁸

The creation of modern states implied centralization of the right to use force to the head of the state—generally, to the king.⁷⁹ The state became the only entity claiming the monopoly on the

⁷⁰ D. J.H. Greenwood, ‘The Semi-Sovereign Corporation’, Legal Studies Research Paper Series, available at <http://ssrn.com/abstracts=757315>. See also P. W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, *supra* note 28, at 35.

⁷¹ A.D. Garrett, ‘The Corporation as Sovereign’, 60 *Maine Law Review* (2008) 129, at 133. See also J. Micklethwait and A. Wooldridge, *The Company: A Short History of a Revolutionary Idea* (2nd edn, New York, Random House LLC, 2005), at 21-26.

⁷² J.E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, *supra* note 57, at 61.

⁷³ *Ibid*, Chapter 2.

⁷⁴ *Ibid*.

⁷⁵ E. Rigaud, ‘Janice E. Thompson: le mercenariat comme forme socio-historique de coercition privée’, 52 *Cultures & Conflits*, (2003), at 139-154. Author’s translation.

⁷⁶ N. Machiavelli, *The Prince*, (New York: Nortons, [1513] 1992), at 34.

⁷⁷ W. Urban, *Medieval Mercenaries, The Business of War* (London: Greenhill Books 2006), at 75.

⁷⁸ See J. E. Thomson, ‘State Practices, International Norms, and the Decline of Mercenarism’, 34 *International Studies Quarterly ISQ*, (1990), at 23-47.

⁷⁹ J. P. Derriennic, *Les Guerres Civiles*, (Paris: Presses de Sciences Po, 2001), at 147.

legitimate use of physical force over a given territory.⁸⁰ This was a radical change and had a strong military impact: standing national armies became the norm.⁸¹ The use of mercenaries was considered an obstacle to the proper management of state affairs; “[n]ew ideas about the relationship between states and citizens reinforced the existing notion that the use of mercenaries was immoral [...]”⁸² Thus, interest in mercenaries diminished but did not disappear⁸³ and eventually domestic laws prohibited their use.⁸⁴ The first such legislation appeared in the US: the neutrality law of 1794 prohibited US citizens to wage war against any country at peace with the United States.⁸⁵

International initiatives addressing mercenarism included Article 9 of the Project of an International Declaration concerning the Laws and Customs of War of 1874, which incorporated mercenaries into the law of war as combatants.⁸⁶ The Hague Conventions of 1907 similarly addressed mercenarism, limiting neutral states’ use of mercenaries.⁸⁷ Despite this growing consensus about mercenaries, there was no prohibition, at the international level, on the use of mercenaries until the end of the twentieth century.⁸⁸ Mercenaries were considered a legitimate means of warfare until the post-colonial time.⁸⁹

Indeed, during the nineteenth and twentieth centuries, several states hired mercenaries—from Latin American countries during their wars of liberation to the British during the Crimean

⁸⁰ M. Weber, *The Theory of Social and Economic Organization*, (trad. A.M. Henderson & T. Parsons, New York: Free Press, [1920] 1964), at 154.

⁸¹ S. Percy, *Mercenaries The History of a Norm in International Relations*, (New York: Oxford University Press, 2007), at 165.

⁸² *Ibid.*

⁸³ E. B. Smith, ‘The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications’, 104 *Parameters*, (2002), 104-119.

⁸⁴ J.E. Thomson, ‘State Practices, International Norms, and the Decline of Mercenarism’, *supra* note 78, at 23-47.

⁸⁵ Neutrality Law of 1794 states: “if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise...against the territory or dominions of any foreign prince or state of whom the United States was at peace that person would be guilty of a misdemeanour.”

⁸⁶ Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Art. 9.

⁸⁷ Hague Convention V - Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted October 18, 1907; entered into force January 26, 1910), Art. 4.

⁸⁸ See J. E. Thomson, ‘State Practices, International Norms, and the Decline of Mercenarism’, *supra* note 78; See also S. Percy, *supra* note 81.

⁸⁹ See for instance P. Chapleau, ‘De Bob Denard aux sociétés militaires privées à la française’, 52 (4) *Cultures & Conflits* (2003), 49-66.

War.⁹⁰ After the end of the Napoleonic Wars and the Congress of Vienna, thousands of professional soldiers were looking for new opportunities.⁹¹ Many of them saw opportunity in Latin America and, led by Simón Bolívar, they participated in the Latin American independence wars.⁹²

At this time, Britain was constantly looking for new markets for its industry. Whereas the Spanish colonial system did not allow the entry of English merchants, the independence of Latin America meant new markets for the British.⁹³ Nonetheless, the policy of neutrality on the Spanish colonial affairs decided by the Congress of Vienna did not allow Britain to participate directly in the Latin American independence wars—sending national troops or hiring international troops, as it had done during the American revolutionary war, was not an option.⁹⁴ However, despite this formal neutrality, Spain had serious doubts about the British respecting their commitment, and they denounced the presence of British mercenaries.⁹⁵ In reality, Britain did not directly send mercenaries to support the Latin American independence wars; however, it permitted the recruitment of mercenaries in its territory.⁹⁶

Mercenaries returned on the international scene during the second half of the twentieth century; called “vagabond mercenaries,”⁹⁷ these mercenaries ostensibly acted relatively autonomously of states.⁹⁸ They were active in several African countries between 1960 and 1995, typically acting against national liberation movements.⁹⁹ While the colonial states never

⁹⁰ J. E. Thomson, ‘State Practices, International Norms, and the Decline of Mercenarism’, *supra* note 78, 23-47.

⁹¹ C. Thibaud, *Repúblicas en armas. Los ejércitos bolivarianos en la guerra de Independencia en Colombia y Venezuela* (Bogotá: Planeta, 2003), at 384.

⁹² *Ibid.*

⁹³ L. Bethell, *The Independence of Latin America* (Cambridge, Cambridge University Press, 1987), at 5.

⁹⁴ M. Brown, *Adventuring through Spanish Colonies, Simón Bolívar, Foreign Mercenaries and the Birth of New Nations* (Liverpool, Liverpool University Press 2006), at 14.

⁹⁵ R. Earle, *Spain and the independence of Colombia* (Exeter: University of Exeter Press 2000), at 34.

⁹⁶ C. Thibaud, *supra* note 91, at 386.

⁹⁷ Anthony Mockler’s characterization in A. Mockler, *The New Mercenaries* (St Paul: Paragon House, 1985) at 9, quoted in K. R. Nossal, ‘Global Governance and National Interests: Regulating Transnational Security Corporations in the Post-Cold War Era’, 2 *Melbourne Journal of International Law*, (2001), 459–476 at 468.

⁹⁸ States’ support to those mercenaries is controversial; the funding of their operation is often obscure. See for instance: P. Chapleau, *supra* note 89, at 50.

⁹⁹ *Ibid.* See also X. Renou, *La privatisation de la violence, Mercenaires & société militaires privées au service du marché* (Marseille: Agone 2005), at 13.

formally supported or paid the “vagabond mercenaries,”¹⁰⁰ the former refrained from condemning the latter’s activities, and several cases of unofficial support by colonial states have been identified.¹⁰¹ For instance, “in 1961 the Belgian government chose not to enforce Belgian laws against mercenary recruiting [...], but to allow Belgian corporations to back an attempted secession by Katanga, a mineral-rich Congolese province, from newly independent Congo.”¹⁰² “Vagabond mercenaries” were also active in Colombia during this period. The most famous of these was Yair Klein, a former Israeli soldier who has created a security company Hod Halanit (Spearhead Ltd). Klein started working in Colombia in 1988 to train self-defense groups for landowners.¹⁰³ He trained several paramilitary leaders to use weapons and explosives and in anti-guerrilla fighting techniques.¹⁰⁴ Like the “vagabond mercenaries” active against the African liberation movements, there is uncertainty about who contracted the services of Klein and others like him in Colombia during this period.¹⁰⁵

The international community has extensively condemned “vagabond mercenaries”: the United Nations, through the General Assembly¹⁰⁶ and the Security Council “*condemns* any State which persists in permitting or tolerating the recruitment of mercenaries, and the provision of facilities to them, with the objective of overthrowing the Governments of States Members of the United Nations.”¹⁰⁷ Following the condemnation of mercenaries, the General Assembly

¹⁰⁰ K. R. Nossal, *supra* note 97, at 468.

¹⁰¹ For instance, following his last coup attempt in the Comoros, Bob Denard—a well-known French vagabond mercenary—was acquitted in France in 1999 due to lack of evidence. “He was, he liked to say, a ‘corsair of the Republic’, implicitly given permission to proceed with dash and without compunction.” In ‘Bob Denard’, *The Economist* (October 18th, 2007). See also ‘Bob Denard a toujours agi pour le compte de l’Etat français’, *Le Monde* (October 15th, 2007).

¹⁰² J. Cockayne, ‘The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law’, 88 (863) *International Review of Red Cross (Int’l Rev. of the Red Cross)*, (2006), at 475.

¹⁰³ ‘Mercenarios condenados’, *Semana*, (March 18, 2002).

¹⁰⁴ ‘Capturan en Rusia a Yair Klein, el mercenario israelí que inició la instrucción de los paramilitares’, *Semana*, (August 28, 2007).

¹⁰⁵ See for instance, ‘Yair Klein cuenta su historia’, *Semana*, (March 18, 2012).

¹⁰⁶ See for instance, Déclaration sur L’inadmissibilité de l’intervention dans les affaires intérieures des États et la protection de leur indépendance et de leur souveraineté, General Assembly: GA Res. 2131, UN Doc. A/6014 (1965). See also General Assembly: GA Res. 2465, UN Doc. A/7218; Déclaration Relative aux Principes du Droit International touchant les Relations Amicales et la Coopération entre les États, General Assembly: GA Res. 2625, UN Doc. A/8028 (1970).

¹⁰⁷ Security Council, SC Res 239 (1967) of 10 July 1967, S/RES/239 (1967).

adopted in 1989 the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (hereinafter the Convention on the Use of Mercenaries).¹⁰⁸

2.1.3 The emergence of PMSCs

The Convention on the Use of Mercenaries captured part of the sea change that occurred at the end of the Cold War. The main state concerns changed, as communism was no longer the main threat. New threats, such as drug trafficking and terrorism, emerged that were more diffuse, and wars became more intra-state and asymmetric than classical state-on-state conflicts.¹⁰⁹ This new global security environment required a new scheme of security, and large standing armies were no longer the model for modern states.¹¹⁰ PMSCs offer a more flexible alternative: “privatization of security permits us to confront new threats where the distinction between guerrillas and mafias, political violence and organized crime is less clear than before...”¹¹¹

On the one hand, “the strain on human and financial resources encouraged the increasing specialization of military personnel and the outsourcing of functions other than combat.”¹¹² The US Department of Defense (DoD) started to privatize all activities not “directly linked to war fighting.”¹¹³ On the other hand, the “Revolution in Military Affairs” has made Western militaries dependent on technological expertise that is no longer available within their armed

¹⁰⁸ The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, (adopted December 4, 1989; entered into force on October 20, 2001) 2163 UNTS 75. [Hereinafter International Convention against the Use of Mercenaries]

¹⁰⁹ See for instance, M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford: Stanford University Press, 1999); P. Collier, *Economic Causes of civil Conflict and their implications for Policy*, (Washington DC: Word Bank 2000).

¹¹⁰ For instance, between 1987 and 1994 the US, Soviet / Russian, French, and British military forces decrease from 5.23 to 1.24 millions men. See P. Chapleau and F. Misser, ‘Le Retour des Mercenaires’, 94 *Politique Internationale, La Revue*, (2001-2002), 217-242.

¹¹¹ Jean-Jacques Roche, *Contractors, Mode d’Emploi* (copy on file with author).

¹¹² E. Cusumano, ‘Policy Prospects for Regulating Private Military and Security Companies’, in F. Francioni and N. Ronzitti, *supra* note 1, at 12.

¹¹³ US Department of Defense, Quadrennial Defense Review Report (September 30, 2001), available at <http://www.defenselink.mil/pubs/pdfs/QDR2001.pdf>, at 53,

forces.¹¹⁴

The end of the Cold War has also implied a change in the political view on the control over force. There are two competing theories that have influenced the debate over state control of the use of force: republicanism and liberalism. “Republicanism advocates the centralization of the provision of security within the state and national armed forces composed of conscripted citizen-soldiers. Liberalism [...] suggests the fragmentation and limitation of governmental powers and the political neutrality of professional armed forces.”¹¹⁵ The tendency after the end of the Cold War has been to privatize, moving toward an approach more consistent with liberalism. Currently, private actors are everywhere:

IT companies write the software and build the hardware that allows states to fight against online-crime and wage cyber-war; airlines and shipping companies are increasingly involved in privatized forms of border protection, and migration management; the robotics firms that build drones and military robots write software that finds targets and sets mission priorities; private technicians and weapons experts man ships and military bases; businesses scour open-sources for intelligence on terrorism that they sell to governments.¹¹⁶

The rise of PMSCs’ use since the 1990s has also been explained through an economic argument.¹¹⁷ Several analysts argue that the use of PMSCs is less expensive than the use of public forces.¹¹⁸ As a result, “Washington fell for the era’s biggest business fad: outsourcing [...] do only what you do best, and pay someone else to do the rest. The Pentagon decided that it should concentrate on its core competency—‘warfighting.’”¹¹⁹ In reality, there is no actual

¹¹⁴ D Avant, ‘The Marketization of Security’ in J. Kirshner (ed), *Globalization and National Security* (New York: Routledge, 2006), 105–43.

¹¹⁵ E. Krahmann, *supra* note 7, at 3.

¹¹⁶ B. Buckland, and T. Winkler, *supra* note 3, at 10.

¹¹⁷ Some analysts consider these historical and economic explanations for the increased use of PMSCs in the last twenty years to be unsatisfactory in that they are primarily descriptive and appear to de-politicize and de-problematize the issue. As a result, much of the existing research presents the market for private security as a natural fact and disregards the fact that the market is embedded in a discursive system of beliefs that sees these companies as legitimate. Another stream of scholarly debate posits that the rise of PMSCs can be explained by collusion between those who outsource the tasks (typically, the government) and those who receive the contracts (e.g., PMSCs). See for instance C. Olsson, ‘Vrai procès et faux débats: perspectives critiques sur les argumentaires de légitimation des entreprises de coercition para-privées’, 52 *Cultures & Conflits* (2003), at 14.

¹¹⁸ “Private security companies have a number of competitive advantages. One of them is efficiency. Standing militaries have large built-in costs that cannot be avoided, whereas a private security company, because it recruits staff for a specific operation, doesn’t have to pay for staff not in operation. This lowers the overall cost. T. Pfanner ‘Interview with Andrew Bearpark’, 88 *Int’l Rev. of the Red Cross*, (September 2006), at 451.

¹¹⁹ J. Surowiecki, ‘Army, Inc.’, *New Yorker* (January 12, 2004).

knowledge about the real cost of private military operations, as there has been no comprehensive financial study.¹²⁰

This creeping privatization both explains and is explained by the Convention on the Use of Mercenaries, which entered into force in 2001.¹²¹ To date, only thirty-three states have ratified it.¹²² This can be partly explained by the content of the agreement—particularly, the very narrow definition of “mercenary” used in the Convention is considered by many to be “unworkable.”¹²³

The direct consequence of the Convention’s definition of mercenary is that new actors, like contractors, cannot easily be classified as mercenaries even if some of their activities closely resemble mercenarism, as it has historically been understood. Using such a narrow definition, states retained the right to use private forces when they are integrated with their own forces.¹²⁴ Furthermore, it has opened the door for the reappearance of non-state actors authorized to use force—one of the key challenges as PMSCs appear to be more and more active around the world.¹²⁵

2.2 International response

¹²⁰ R. Burge, ‘Effectiveness and Efficiencies and Private Military Corporations’, Naval Postgraduate School Thesis, (June 2008), at 63-64. About the real cost of PMSCs: Mr Prince, former director of Blackwater (now academi) testified before the US Congress: “I don’t know what those numbers are, sir, but that would be a great fully burdened cost study that Congress could sponsor. They don’t have to do the whole thing, just take some key nodes and really study it,” BLACKWATER USA. Hearing before the Committee on Oversight and Government Reform, House of Representatives, One Hundred Tenth Congress, First Session, October 2, 2007, No. 110–89, at 87.

¹²¹ International Convention against the Use of Mercenaries, *supra* note 108.

¹²² *Ibid.*, Status as at January 22, 2014, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-6&chapter=18&lang=en

¹²³ F. Hampson, ‘Mercenaries: Diagnosis before Prescription’, 3 *Netherlands Yearbook of International Law* (1991) 3–38 at 14–16.

¹²⁴ A. Cassese, ‘Mercenaries: Lawful Combatants or War Criminals?’, 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1980), 1-30.

¹²⁵ See PMSCs’ activities in places such as Croatia and Sierra Leone, in D. Avant, *The Market for Force, The consequence of privatizing security*, *supra* note 28, at 86-87; D. Avant, ‘Opportunistic Peacebuilders? International Organizations, Private Military Training and State-building after War,’ in R. Paris and T. Sisk, (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Post-war Peace Operations*, (New York: Routledge, 2008), at 8; D. Brooks, ‘Write a Cheque, end a War’, *Conflict Trends* (2000), at 33.

Several international initiatives have emerged to address the lack of control on PMSCs' activities and to clarify relevant existing international obligations. The Swiss government and the International Committee of the Red Cross (ICRC) prepared and supported the first initiative: Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (hereinafter the Montreux Document).¹²⁶ The draft of the second—Draft of a possible Convention on Private Military and Security Companies (PMSCs) (hereinafter the Draft Convention)—was proposed to the Human Rights Council (HRC) for consideration and action in September 2010 by the UN Working Group on Mercenaries.¹²⁷ This part focuses on these two international initiatives, analyzing their strengths and shortcomings in regulating PMSCs, and discusses the lack of political will to regulate PMSCs, even in the European Union which is relatively proactive on human rights issues.

2.2.1 The Montreux Document

In order to specifically address the challenges posed by PMSCs, the Swiss government took “two approaches: one focusing on working with industry to develop an international ‘code of conduct’; the other to work through intergovernmental discussion to clarify existing international law in the area.”¹²⁸ This section focuses on the latter—the Montreux Document—while the former, the International Code of Conduct, is discussed in Chapter Five.

The negotiation on states' obligations culminated in the September 2008 endorsement of the Montreux Document by seventeen governments.¹²⁹ It is the first intergovernmental statement to articulate the most pertinent human rights and international humanitarian law obligations with regard to PMSCs, and it is expressly open for endorsement by states and international

¹²⁶ Montreux Document, *supra* note 10.

¹²⁷ Draft Convention, *supra* note 11.

¹²⁸ J. Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’, 13 (3) *Journal of Conflict & Security Law* (2008), at 417. The second part of the Swiss Initiative took the form of an industry-wide international code of conduct that articulates principles for private security service providers and will be analyzed in the following part on PMSCs' obligations.

¹²⁹ The original endorsers were: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, United States of America.

organizations.¹³⁰ In order to provide practical guidance, the Document is divided into two main parts with the explicit purpose of “...recall[ing] existing legal obligations of [s]tates and PMSCs and their personnel (part one), and provid[ing] [s]tates with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (part two).”¹³¹ Both parts examine the hard and soft law relevant to the three categories of states implicated by PMSCs’ activities: contracting states, territorial states, and home states.¹³²

On the one hand, the Montreux Document is a pragmatic document that represents an important first step towards improving PMSC regulation. It “provides a set of generally respected standards on which other regulatory initiatives might be built.”¹³³ By reaffirming that international humanitarian law (IHL) and international human rights law (IHRL) apply during armed conflict and that states have an obligation to ensure respect for them, the Montreux Document “clearly addresse[s] the prevailing concern at the time that PMSCs operated in a potential legal vacuum.”¹³⁴ It stresses that PMSCs should be adequately regulated and held accountable for their conduct,¹³⁵ and the seventy-three “good practices” contained in the Document “may lay the foundations for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards.”¹³⁶

On the other hand, however, there are numerous concerns about the process for preparing the Montreux Document, as well as a number of lacunae in the content itself. The process raised concerns about how representative it was, not being a broad consultative process.¹³⁷ “[A]n ad

¹³⁰ Montreux Document, *supra* note 10, Preface.

¹³¹ Montreux Document, *supra* note 10, Preface, at para 2.

¹³² *Ibid.*

¹³³ J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry*, *supra* note 9, at 427.

¹³⁴ R. DeWinter-Schmitt (ed), *Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices*, (2013) available at <http://ihrib.org/wp-content/uploads/2013/12/MontreuxFv3.pdf>, at 7.

¹³⁵ Montreux Document, *supra* note 10, Explanatory Comments, at 31.

¹³⁶ N. D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention’, 11 *Human Rights Law Review* (2011), 133-151.

¹³⁷ J. L. Gomez del Prado, ‘A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors’, 1 (1) *Notre Dame Journal of International, Comparative, & Human Rights Law* (2011), at 30.

hoc group of 17 states clearly cannot represent the wider international community.”¹³⁸ Notably, particularly for the purposes of this study, is that countries from Latin America and the Caribbean were completely absent from the Montreux process.¹³⁹ Furthermore, “the unbalanced representation of Western States (nine out of the seventeen adopting States) denotes the heavy involvement of countries from where most of the security industry originates and operates.”¹⁴⁰ The Document also reflects a state-centered perspective, which is “unsurprising, given the exclusion of non-state actors from the final stages of the negotiation.”¹⁴¹

The endorsement phase of Montreux process also raised concerns. Few Latin American and Caribbean states have endorsed the Montreux Document.¹⁴² During the regional workshop convened by the Swiss Federal Department of Foreign Affairs and the Chilean Ministry of Foreign Affairs, in cooperation with the ICRC, the Geneva Center for the Democratic Armed Forces (DCAF), and the Global Consortium on Security Transformation, fifteen states from the region participated.¹⁴³ Few representatives of states recognized the potential interest of the Montreux Document in the region, and the widely-held position was that PMSCs in armed conflict is not an issue in Latin America.

In addition to its process-based shortcomings, the Montreux Document “has failed to address the regulatory gap in the responsibility that [s]tates have with respect to the conduct of PMSCs and their employees.”¹⁴⁴ It is not binding and does not create any new states’ obligations; even

¹³⁸ N. D. White, ‘Regulatory Initiatives at the International Level’, in C. Bakker and M. Sossai, *supra* note 31, at 12. The Swiss delegation has responded several times to this criticism by affirming that it wanted “a result in a reasonable time limit.” See for instance, P. Seger, (2010) ‘The Swiss initiative on private military and security companies’, in International Institute of Humanitarian, *Law Non-State Actors and International Humanitarian Law, Organized armed groups: a challenge for the 21st century* (Milan: FrancoAngeli, 2010).

¹³⁹ See the seventeen original endorsers of the Montreux Document, *supra* note 129.

¹⁴⁰ J. L. Gomez del Prado, *supra* note 137, at 30.

¹⁴¹ J. Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’, *supra* note 128, at 418.

¹⁴² To date (August 2014) only four countries in the region have endorsed the Montreux Document: Ecuador (February 12, 2009), Chile (April 06, 2009), Uruguay (April 22, 2009), and Costa Rica (October 25, 2011).

¹⁴³ There were also eighty representatives of governments, international organizations, and civil society from sixteen countries in Latin America and the Caribbean. In The Montreux Document on Private Military and Security Companies: Proceedings of the Regional Workshop for Latin America Santiago, Chile (May 12 & 13, 2011) available at <http://www.dcaf.ch/Publications/The-Montreux-Document-on-Private-Military-and-Security-Companies-Proceedings-of-the-Regional-Workshop-for-Latin-America>.

¹⁴⁴ *Ibid.*

so, it is useful in its restatement of certain states' obligations and elaboration of some good practices in the field of PMSCs.

First of all, the Montreux Document adopts a functional approach to define PMSCs based on the character of their contributions, such as "armed guarding and protection of persons and objects...."¹⁴⁵ The definition of PMSCs avoids discussing their potential "direct participation in hostilities" and, thus, "sidestep[s] arguments that seek to differentiate private military [companies] and private security companies based on the nature of [their] contribution."¹⁴⁶

When discussing states' obligation to ensure respect for IHL, the Montreux Document describes the obligation in a way that is at odds with the Geneva Conventions. According to Common Article 1 of the Geneva Conventions, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*."¹⁴⁷ The Montreux Document, by contrast, contains an obligation for states to ensure respect for IHL "within their power."¹⁴⁸ As it is possible for state agents and individuals alike to violate IHL, "the obligation of states to ensure respect for IHL should include measures directed not only to PMSCs they contract but also to PMSCs hired by other private entities such as corporations and NGOs."¹⁴⁹

The Montreux Document recalls several states' obligations concerning IHL. For instance, contracting states "retain their obligations under international law, even if they contract

¹⁴⁵ Montreux Document, *supra* note 10, definition. See also J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry*, *supra* note 9, at 406.

¹⁴⁶ *Ibid.*

¹⁴⁷ Article 1 Common to the Geneva Conventions, emphasis added. In Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (adopted August 12, 1949; entered into force October 21, 1950) 75 UNTS 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted August 12, 1949; entered into force October 21, 1950) 75 UNTS 85 [hereinafter Geneva Convention II]; Geneva Convention relative to the Treatment of Prisoners of War, (adopted August 12, 1949; entered into force October 21, 1950) 75 UNTS 135 [hereinafter Geneva Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted August 12, 1949; entered into force October 20, 1950) 75 UNTS 287 [hereinafter Geneva Convention IV].

¹⁴⁸ Montreux Document, *supra* note 10, Part 1, §§ 3, 9, 14 and 18.

¹⁴⁹ M. -L. Tougas, 'Some Comments and Observation on the Montreux Document', in M. N. Schmitt, *Yearbook of International Humanitarian Law*, Vol. 12 (The Hague: T.M.C. Asser Press, 2009) 321-346, at 326.

PMSCs to perform certain activities.”¹⁵⁰ As a result, they have the obligation to not contract PMSCs to perform tasks specifically assigned by IHL to state agents.¹⁵¹

The Montreux Document also mentions that states have the obligation to criminally punish those who have committed grave IHL violations.¹⁵² It suggests that states “provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State’s national legal system.”¹⁵³

The second part of the Montreux Document is composed by “good practices,” which could be applied in situations other than armed conflict.¹⁵⁴ For instance, the procedure of states’ selection of PMSCs is a particular focus of the Montreux Document; states are encouraged to select PMSCs carefully, with transparent processes and according to criteria that account for the past services, background, resources, and personnel policies of firms.¹⁵⁵

In the good practices, states, and particularly territorial states, are invited to consider the impact of bilateral agreements they can sign with contracting states on compliance with national laws and regulations.¹⁵⁶ They should address the issue of jurisdiction and immunities to ensure proper coverage and remedies. They are also encouraged to negotiate agreements on legal coordination and cooperate with contracting and home states over the investigation of matters of common concern.¹⁵⁷

On the side of contracting and home states’ obligations, the Montreux Document calls for regulation and oversight of PMSCs’ activities abroad; however, it does not “specify any form

¹⁵⁰ Montreux Document, *supra* note 10, Part 1, § 1.

¹⁵¹ For instance, the responsibility for operating prisoner-of-war camps, in *Ibid.*, Part 1, § 2.

¹⁵² Montreux Document, *supra* note 10, Part 1, § 5.

¹⁵³ *Ibid.*, Part 2, § 49.

¹⁵⁴ “[The Good Practices] may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.” In Montreux Document, *supra* note 10, Part Two, Introduction

¹⁵⁵ *Ibid.*, Part 2, §§ 2 - 9.

¹⁵⁶ *Ibid.*, Part 2, Introduction.

¹⁵⁷ *Ibid.*, Part 2, §§ 51-52.

of ongoing state engagement with PMSCs to assess and address human rights risks related to their operations.”¹⁵⁸

Even though several of the good practices can be considered human rights standards and the application of IHRL during armed conflict is well recognized, the Montreux Document fails to explicitly include states’ obligations to protect and apply the standard of due diligence.¹⁵⁹ The standard language of “duty to protect” and “responsibility to respect” does not appear in the Montreux Document, “even though this construction constitutes the consensus formulation in relation to the standard governing business and human rights.”¹⁶⁰ The language relating to human rights was removed from the final draft of the Document with the explanation that it was too vague.¹⁶¹ However, more references to IHRL would have been useful because as PMSCs are also active in situations, such as post-conflict situations in which IHRL is relevant.¹⁶²

In the event of a wrongful act by a PMSC, the attribution to states should follow the rules established by the International Law Commission (ILC), analyzed below.¹⁶³ The Montreux Document suggests that the wrongful act of a PMSC or its personnel can be attributed to a state when the PMSCs or its personnel can be considered agents of that state.¹⁶⁴ It also reaffirms that the conduct of a PMSC, or its personnel, empowered by a state to exercise governmental authority will be attributable to the state; however, it does not define the scope of governmental authority.¹⁶⁵ The wrongful acts of PMSCs acting on the instructions of the state or under its direction or control will similarly be attributed to that state. Therefore, states should provide PMSCs with clear instructions since “[b]y providing vague instructions, the state bears the risk that such instructions will be interpreted in such a way as to result in the

¹⁵⁸ R. DeWinter-Schmitt, *supra* note 134, at 55.

¹⁵⁹ Amnesty Int’l, Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict, AI Index IOR 30/010/2008 (October 14, 2008), available at: <http://www.amnesty.org/ar/library/asset/IOR30/010/2008/en/5bca5962-99de-11dd-bf88-f59215f3db50/ior300102008en.pdf>.

¹⁶⁰ *Ibid.*

¹⁶¹ J. Cockayne et al., *Beyond Market Forces Regulating the Global Security Industry*, *supra* note 9, at 424.

¹⁶² N. D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention’, *supra* note 136.

¹⁶³ See Chapter 4 on international responsibility.

¹⁶⁴ Montreux Document, *supra* note 10, Contracting State, § 3.

¹⁶⁵ *Ibid.*, Contracting State, § 7.

[PMSC] committing internationally wrongful acts.”¹⁶⁶

Finally, the Montreux Document mentions the issue of remedies but it does not elaborate on the subject.¹⁶⁷ The provisions require all states to provide effective remedies for breaches of IHL and IHRL by PMSCs but it does not explain what an “effective remedy” is. Similarly, it references “reparations” but does not provide any further instruction.¹⁶⁸

The Montreux Document is the first international document addressing PMSCs. It lists states’ obligations and responsibilities concerning the specific challenges posed by PMSCs. Even though it lacks representativeness among the international community, the Montreux Document provides a political recognition of the concerns surrounding the PMSC phenomenon, and it “represents perhaps the only possible international agreement at this stage.”¹⁶⁹ It also provides a set of rules on which future regulation of PMSCs should be built. However, its biggest weakness is the fact that it is not binding, which may be the *raison d’être* of the UN Draft Convention.

2.2.2. The UN Draft Convention

Like the Montreux Document, the Draft Convention on Private Military and Security Companies (hereinafter Draft Convention) is one of the most advanced international initiatives aiming to specifically address states’ role in regulating PMSCs. And like the Montreux Document, the Draft Convention has strengths and weaknesses as a regulatory instrument. As explained in this section, its principal obstacle to becoming an international convention is its lack of political support among Western states.

The former United Nations (UN) Commission of Human Rights established the UN Working

¹⁶⁶ University Center for International Humanitarian Law, ‘Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions’, August 29-30, 2005, at 19.

¹⁶⁷ Montreux Document, *supra* note 10, Part 1, §§ 4, 10, 15.

¹⁶⁸ R. DeWinter-Schmitt, *supra* note 134, at 124.

¹⁶⁹ S. Percy, ‘Regulating the private security industry: a story of regulating the last war’, 94 (887) *Int’l Rev. of the Red Cross* (2013), at 954.

Group on the Use of Mercenaries in 2005.¹⁷⁰ Its mandate was to monitor private companies offering military assistance, consultancy, and security services and study how their activities on the international market affected the enjoyment of human rights, particularly the right of peoples to self-determination.¹⁷¹ The Working Group then started preparing a draft of basic international principles that encourages those companies to respect human rights in their activities.¹⁷²

In 2008, the HRC broadened the mandate of the UN Working Group through the vote on Resolution 7/21. The UN Working Group continued its work on the draft document “to elaborate and present concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles.”¹⁷³ To do this, the Working Group followed a twofold approach:

on the one hand, it examines possible human rights violations that mercenaries or people recruited by PMSCs in situations of violence, low-intensity armed conflicts or post-conflicts may commit. On the other hand, it considers possible violations that those private security companies may commit to the ‘security guards’ they have recruited and employed to operate in low-intensity armed conflict or post-conflict situations. Within this context, it often appears that PMSCs, in their search for profit, neglect security and do not provide their employees with the basic rights, such as health facilities, expected in such situations.¹⁷⁴

The Working Group’s labors culminated with the submission of the Draft Convention to the HRC in July 2010 and its presentation at the United Nations in August 2010.¹⁷⁵ Based on the proposal, the HRC established an open-ended intergovernmental working group to continue the work of elaborating a legally binding instrument on the regulation, monitoring, and

¹⁷⁰ UN Commission of Human Rights, Resolution 2005/2, 7 April 2005.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Human Rights Council, Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination Resolution 7/21 (March 28, 2008).

¹⁷⁴ J. L. Gomez del Prado, ‘Private Military and Security Companies and the UN Working Group on Mercenaries’ 13 (3) *Journal of Conflict & Security Law* (2009), at 443.

¹⁷⁵ Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Self-determination’, UN Doc A/HRC/15/25 (July 5, 2010). See also Working Group on the Use of Mercenaries, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, ¶¶18–30, (2010) transmitted by Note of the Secretary-General, UN Doc. A/65/325 (August 25, 2010).

oversight of the impact of PMSCs' activities on the enjoyment of human rights.¹⁷⁶ The vote for the resolution that created the open-ended intergovernmental working group was adopted by a majority of thirty-two in favor, twelve against, and three abstentions.¹⁷⁷ The fact that none of the seven Western countries in the HRC voted in favor of the creation of the intergovernmental working group foreshadowed some of the issues that exist with the Draft Convention.¹⁷⁸

The aim of the Draft Convention is to “reaffirm and strengthen State responsibility for the use of force”—this it does by “identify[ing] those functions which are inherently governmental and which cannot be outsourced.”¹⁷⁹ The Draft Convention defines “inherent state functions” in a way that is “consistent with the principle of State monopoly on the legitimate use of force”¹⁸⁰ and includes:

direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees.¹⁸¹

Although the state monopoly on the use of force has been an objective for most states, this restrictive definition has no consensus in the international community. Rather:

[it] is based on a particular understanding of the role of the state, a view that might not be shared by all governments, especially those with the most aggressive approaches to privatisation. It contrasts with the Montreux Document, which only identified prohibitions on contracting states outsourcing activities that international humanitarian law assigns to states,

¹⁷⁶ Human Rights Council meeting, Press Release of 1 October 2010, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID1/410407&LangID1/4E>

¹⁷⁷ The result of the vote was as follows: In favor (32): Angola, Argentina, Bahrain, Bangladesh, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, Guatemala, Jordan, Kyrgyzstan, Libyan Arab Jamahiriya, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Uruguay and Zambia. Against (12): Belgium, France, Hungary, Japan, Poland, Republic of Korea, Republic of Moldova, Slovakia, Spain, Ukraine, United Kingdom, and United States. Abstentions (3): Maldives, Norway, and Switzerland. In Human Rights Council establishes Working Group on activities of Private Security Companies, renews mandates on Sudan and Somalia, at 4, available at http://reliefweb.int/sites/reliefweb.int/files/resources/1D80786AA85ABF37852577AF00755F7E-Full_Report.pdf.

¹⁷⁸ *Ibid*

¹⁷⁹ Draft Convention, *supra* note 11, Art. 1(1)

¹⁸⁰ *Ibid.*, Art. 2(i)

¹⁸¹ *Ibid.*

such as exercising the power of the responsible officer over prisoners of war or internment camps.¹⁸²

This definition is based on a conceptualization of the role of the state that is highly political, which posed a significant struggle for the progression of the debate and the possible advancement toward an international convention.¹⁸³ Thus, a provision that might have served to drastically improve the regulation of PMSCs ultimately alienated a significant number of states—many of them Western countries—and has undermined the entire endeavor.¹⁸⁴ Without the participation of key contracting states, such as the US and UK, “chances are that the convention might share the fate of the 1989 Mercenary Convention and become largely irrelevant in guiding security practices.”¹⁸⁵

While the Draft Convention’s definition of “inherent state functions” is at once conservative, in that it maintains the rule of state monopoly on use of force, and progressive, in that it would improve regulation of PMSCs, the Draft Convention’s overall tendency is to be more conservative than progressive. One area in which the Draft Convention falls short of its potential is in its failure to address PMSCs’ direct obligations and responsibilities. In a previous draft, Article 31 stated that “[w]ithin their respective spheres of activities and influence, Private Military and Security Companies have the obligations to respect, ensure respect of[,] and protect human rights recognized in international as well as national law.”¹⁸⁶ But this article was not included in subsequent drafts. Instead, “the vast majority of the provisions of the draft conventions are addressed to states in terms of regulating the activities of PMSCs and criminalizing violations of international law.”¹⁸⁷ In so doing, the Draft

¹⁸² N. D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention, *supra* note 136, at 137.

¹⁸³ Interview with Patricia Arias, member of the UN Working Group on Mercenaries, Geneva, December 16, 2013.

¹⁸⁴ *Ibid.*

¹⁸⁵ Å. G. Østensen, ‘UN Use of Private Military and Security Companies: Practices and Policies’, SSR Paper, The Geneva Centre for the Democratic Control of Armed Forces, (2011), available at www.dcaf.ch/content/download/45662/678940/file/SSR_PAPER3.pdf, at 61. For discussion of the Convention on the Use of Mercenaries, see the first section of this chapter.

¹⁸⁶ Draft Convention, *supra* note 11.

¹⁸⁷ L. Cameron and V. Chetail, *supra* note 31, at 300, quoting arts 4-29 of the 2009 draft and arts 4-28 of the 2010 Draft Convention.

Convention simply “reflects the weaknesses of international law”¹⁸⁸ and does not try to address them.

Another of the Draft Convention’s pitfalls is its assumption that states will have the capacity to implement such a convention. For instance, the Draft Convention requires that each state party establish jurisdiction over potential offenses when the offense is “committed within its territory,” “on board a vessel flying the flag of that [s]tate or an aircraft registered under the laws of that [s]tate at the time the offence is committed,” “the offence is committed against a national of that [s]tate,” or “the offence is committed by a stateless person who has his or her habitual residence in the territory of that [s]tate.”¹⁸⁹ These provisions do not contemplate that a state may not be able to ensure security or justice for its citizens or be able to implement the Convention within its own jurisdiction. In other words, the Draft Convention neglects to address the issue of its implementation in weak or failed states. This oversight is particularly serious in light of the fact that weak or failed states “are likely to face severe obstacles fulfilling the obligations of the convention,”¹⁹⁰ and would benefit from additional guidance from the Convention.

Its shortcomings notwithstanding, the Draft Convention proposes a series of interesting measures that should be retained for future PMSC regulations. For example, it proposes the creation of an oversight committee comprised of international experts.¹⁹¹ It also would require state parties to establish a comprehensive domestic regime of regulation and oversight.¹⁹² A final innovation contained in the Draft Convention is the creation of national licensing regimes that would cover trafficking in firearms¹⁹³ as well as the import and export of military and security services.¹⁹⁴

Despite containing several promising proposals, the Draft Convention is both profoundly

¹⁸⁸ N. D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention, *supra* note 136, at 149.

¹⁸⁹ Draft Convention, *supra* note 11, Art. 21.

¹⁹⁰ Å. G. Østensen, *supra* note 185, at 61.

¹⁹¹ Draft Convention, *supra* note 11, Arts 31–32. The Committee is also requested to establish and maintain an international register of PMSCs (Art 30).

¹⁹² *Ibid.*, Art. 13.

¹⁹³ *Ibid.*, Art. 11.

¹⁹⁴ *Ibid.*, Art. 15.

limited and seriously flawed, and PMSCs' direct obligations and responsibilities seem to be still lacking. Furthermore, the drafting process reproduced political biases that have minimized the likelihood that the Draft Convention will find enough international support to be transformed into an international convention. Although it “would constitute a reasonable basis on which to regulate the growing use of PMSCs in conflict and post-conflict zones around the world,”¹⁹⁵ the Draft Convention presented in 2010 by the UN Working Group on Mercenaries likely does not hold much promise for the future.

States seem reluctant to increase control over PMSCs, as this would reduce their room to maneuver in employing PMSCs.¹⁹⁶ The lack of political will to regulate PMSCs has also stopped an initiative undertaken at the regional level in Europe. This attempt to improve regulation of PMSCs came from the research project PRIV-WAR.¹⁹⁷ Following the PRIV-WAR Recommendations on EU Regulatory Action for Private Military and Security Companies and their Services,¹⁹⁸ the European Parliament adopted a resolution in May 2011 in which it considered that “the adoption of EU regulatory measures, including a comprehensive normative system for the establishment, registration, licensing, monitoring and reporting violations of applicable law by private military and security (PMS) companies—both at internal and external level—, is necessary.”¹⁹⁹ The Parliament invited the Commission and the member states to initiate the regulatory measures; however, to date, no further action has been taken.

Given numerous challenges, including a lack of political will, the existing international regulatory framework concerning PMSCs is limited. The Montreux Document, which is not

¹⁹⁵ N. D. White, ‘Regulatory Initiatives at the International Level’, *supra* note 138, at 29.

¹⁹⁶ J. Cockayne, ‘Private Military and Security Companies’, in A. Clapham and P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014).

¹⁹⁷ “The main purposes of the PRIV-WAR research project, funded by the European Commission under the Seventh Framework Programme, are to assess the impact of private military and security companies (PMSCs) on the respect of human rights and IHL; to analyse existing regulatory frameworks at the national, international and EU levels; to explore ways in which the EU could contribute to ensuring compliance with these international legal norms, and to present concrete options for possible regulatory measures, based on the project’s output.” In *Priv-War Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services*, available at http://ec.europa.eu/research/social-sciences/pdf/priv-war-recommendations_en.pdf.

¹⁹⁸ *Ibid.*

¹⁹⁹ Resolution 2010/2299(INI) on the development of the common security and defence policy after the entry into force of the Lisbon Treaty, §§ 53-54.

binding, is the main contender, as the process of transforming the UN Draft Convention into a convention remains arduous and its probability of success low.

Chapter 3: International obligations

States and international organizations (IOs) are subjects of the international system but the former remain the actors on the international scene for whom international obligations have been primarily elaborated.²⁰⁰ There are three categories of states concerned by PMSCs' activities: territorial states, on whose territory a PMSC operates; contracting states, which directly contract for a PMSC's services; and home states, where a PMSC is incorporated.²⁰¹ As states' obligations have been most elaborated with respect to territorial states—and because territorial states bear the primary responsibility for human rights violations²⁰²—this chapter first analyzes general international obligations. The second part of the chapter focuses on the specific challenges related to the different categories of states: the possible limitations of the application of these obligations in territorial states, as well as the extraterritorial application of these obligations for the contracting and home states.

3.1 General obligations

“By becoming parties to universal and regional human rights instruments, states have not only committed themselves to respect the rights enshrined in these Conventions; they have also accepted a number of duties or positive human rights obligations.”²⁰³ In order to paint a detailed picture of these general international obligations, this section is divided into two parts. The first discusses the duty to prevent human rights violations under the four main international and regional regimes of protection of human rights—the International Covenant on Civil and Political Rights, the European System of Human Rights, the African System for

²⁰⁰ “This remains true although at present numerous state functions appear to be disaggregated and delegated to, or calibrated by reference to, a variety of non-state entities, such as transnational networks of officials, public–private administrative bodies operating at the transnational plane, or treaty-based arbitral bodies with specific functional competences.” In N. Bhuta, ‘The Role International Actors Other Than States can Play in the New World Order’, in The Late Antonio Cassese, *Realizing Utopia: The Future of International Law*, (Oxford: Oxford University Press, 2012), at 61.

²⁰¹ Montreux Document, *supra* note 10, Preface, at 10.

²⁰² W. Vandenhoe, ‘Contextualizing the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights’, 12 *Revista de Estudios Jurídicos* (2012).

²⁰³ C. Bakker, ‘Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State’, in F. Francioni and N. Ronzitti, *supra* note 1, 129-148, at 129.

the Protection and Promotion of Human Rights, and the Inter-American System of Human Rights—while the second focuses on the duties to investigate, prosecute, and punish under the three systems that feature these duties.

3.1.1 Duty to prevent

While all international obligations are of great importance, most of them address what is to occur after a human rights violation has already occurred. In this sense, the first, and perhaps most important, international obligation is the duty to prevent violations of human rights, which falls within the scope of the obligations to ensure respect for human rights.²⁰⁴ The universal and regional regimes have defined the duty to prevent violations of human rights in their own contexts, describing the necessary steps states must take to fulfill their obligations.

Regarding the International Covenant on Civil and Political Rights, the Human Rights Committee (HRC) in General Comments on the Nature of the General Obligations Imposed on States Parties to the Covenant describes the nature of the positive obligation to prevent as requiring “that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”²⁰⁵ The HRC also expanded these obligations to ensure protection “not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”²⁰⁶ This means that states not only have to “take administrative measures to exercise a minimum of control over the functions performed by PMSCs and over the selection of these corporations”²⁰⁷ but also must “take reasonable and appropriate measures to protect individuals from harm at the hands of PMSC personnel.”²⁰⁸

²⁰⁴ *Ibid.*, at 136.

²⁰⁵ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, (2004) U.N. Doc. CCPR/C/21/Rev.1/Add.13, § 7.

²⁰⁶ *Ibid.*, § 8

²⁰⁷ C. Bakker, *supra* note 203, at 136.

²⁰⁸ C. Hoppe, ‘Positive Human Rights Obligations of the Hiring State in Connection with the Provision of ‘Coercive Services’ by a Private Military or Security Company’, in in F. Francioni and N. Ronzitti, *supra* note 1, 110-129, at 113.

Similarly, Article 1 of the European Convention of Human Rights (ECHR) contains the obligation for states' parties to "secure" the rights contained in the Convention.²⁰⁹ The European Court of Human Rights (ECtHR) has extensive jurisprudence on the duty to prevent, holding that "[t]he duty to prevent breaches may include the duty to ensure an adequate planning of security operations threatening the right to life."²¹⁰ It has affirmed that "positive obligations of states include the duty to put in place an effective legal Framework."²¹¹ Finally, "Article 1 taken together with Article 3 imposes a positive duty on the state to protect individuals against abuse by third parties, particularly those who are especially vulnerable."²¹²

The African Commission on Human and Peoples' Rights (AComHPR) has also dealt with the duty to prevent violations of human rights, including those perpetrated by non-state actors: "An act by a private individual can generate responsibility of the state because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."²¹³ Thus, a state's failure to exercise due diligence to prevent human rights violations—even those committed by private actors—gives rise to state responsibility.²¹⁴ However, the due diligence obligations are circumscribed by a qualification that states must only act with the means "at [their] disposal."²¹⁵ The AComHPR elaborated three principles to define these limitations. The first regards the "feasibility of effective state action" to foresee and prevent the harm.²¹⁶ Furthermore, systematic failures are considered necessary to give rise to a state due diligence violation.²¹⁷ Finally, imputing state responsibility for violations by non-state actors requires meeting an exacting standard of

²⁰⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) CETS No.: 005, Art. 1. [hereinafter ECHR].

²¹⁰ *Case of McCann v United Kingdom*, ECHR (1996), Appl No 19009/04, § 213.

²¹¹ *Case of X and Y v Netherlands*, ECHR (1985), Appl No 8978/80, § 23. See C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' *EJIL* 19(5) (2008) 989–1014, 1001.

²¹² C. Hoppe, 'Positive Human Rights Obligations of the Hiring State in Connection with the Provision of "Coercive Services" by a Private Military or Security Company', *supra* note 208, at 113. Quoting: *Case of A v United Kingdom*, ECHR (1998), Appl No 100/1997/884/1096, § 22; see also, *Case of Kalashnikov v Russia*, ECHR (2002), Appl No 47095/99; *Case of Valašinas v Lithuania*, ECHR (2001), Appl No 44558/98, §§ 102–6.

²¹³ *Case of Zimbabwean Human Rights NGO Forum v Zimbabwe*, African Commission on Human and peoples' Rights (2006), Communication No. 245/2002, § 143.

²¹⁴ See C. Bakker, *supra* note 203, at 140.

²¹⁵ *Case of Zimbabwean Human Rights NGO Forum v Zimbabwe*, *supra* note 213, § 155.

²¹⁶ *Ibid.*, § 157.

²¹⁷ C. Bakker, *supra* note 203, at 140. Quoting *Case of Zimbabwean Human Rights NGO Forum v Zimbabwe*, *supra* note 213, § 158.

showing “that the state condones a pattern of abuse through pervasive non-action.”²¹⁸

The Inter-American Court of Human Rights (IACtHR) started developing its jurisprudence on the duty to prevent in its first case, *Velásquez-Rodríguez v Honduras*. In *Velásquez-Rodríguez*, the Court interpreted the first article of the American Convention on Human Rights (ACHR),²¹⁹ which imposes on each state a “legal duty to take reasonable steps to prevent human rights violations.”²²⁰ The Court defined “prevention” to include “all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts.”²²¹

The IACtHR confirmed this tendency to hold states to a higher standard in the *Case of the Mapiripán Massacre*, mentioning that

the attribution of responsibility to the State for the acts of individuals may occur in cases in which the state fails to comply with the obligations *erga omnes* contained in Articles (1) and 2 of the Convention, owing to the acts or omissions of its agents when they are in the position of guarantor.²²²

Finally, the Court recognized that it is not plausible to hold the state accountable for every human rights violation that occurs within its territory,²²³ but affirmed that “the obligation of the State to adopt preventive measures to protect individuals in their relationships with each other is conditioned by its awareness of a situation of real and imminent risk for a specific individual or group of individuals, and on the existence of the reasonable possibility of preventing or avoiding that danger.”²²⁴

²¹⁸ *Ibid.*, Quoting *Case of Zimbabwean Human Rights NGO Forum v Zimbabwe*, *supra* note 213, § 160.

²¹⁹ American Convention on Human Rights (adopted November 22, 1969; entered into force July 18, 1978) OAS, No 36, 1144 UNTS 123 [hereinafter ACHR]: Art. 1 “*Obligation to Respect Rights* - 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

²²⁰ *Case of Velásquez Rodríguez v. Honduras*, IACtHR (July 29, 1988), Series C No 4, § 174

²²¹ *Ibid.* § 175.

²²² *Case of Mapiripán Massacre v Colombia*, *supra* note 27, § 111.

²²³ *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27, § 123.

²²⁴ *Case of Valle Jaramillo et al. v Colombia*, IACtHR (November 27, 2008) Series C. No. 192, § 78; See similarly, *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27, § 123.

3.1.2 Duties to investigate, prosecute, and remedy

Similar to the duty to prevent, the duties to investigate, prosecute, and remedy fall within the scope of the obligations to ensure respect for human rights. The universal and regional regimes, excluding the AComHPR, have defined and elaborated these obligations.

In General Comments No 31, the HRC has stated that states have the duty to create administrative mechanisms to ensure the investigation of alleged violations.²²⁵ States also have the obligation to prosecute when an investigation corroborates the allegations.²²⁶ The Committee has made reference to these obligations on several opportunities, including in country reports, stressing that “[a] failure by a [s]tate to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”²²⁷ Finally, states’ parties to the Covenant must provide an effective remedy in the event of a violation.²²⁸ “As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.”²²⁹

The ECtHR has also consistently held that the duty to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention,”²³⁰ implies that there should be “some form of effective official investigation” in the event of human rights violations....²³¹ The Court has been specific that the obligation to investigate violations of the right to life (Article 2) is non-derogable even in armed conflict²³² and must be investigated even in absence of a formal complaint.²³³ Investigations must be independent²³⁴ and prompt and effective.²³⁵

²²⁵ Human Rights Committee, General Comment 31, *supra* note 205, §§ 8 and 15.

²²⁶ *Ibid.*, § 18.

²²⁷ *Ibid.*, § 15.

²²⁸ *Ibid.*, § 11.

²²⁹ *Ibid.*, § 18.

²³⁰ ECHR, Art. 1

²³¹ *Case of Kaya v Turkey*, ECHR (1998), Appl No 158/1996/777/978, § 105. See also *Case of Angelova and Iliev v Bulgaria*, ECHR (2007), Appl No 55523/00, § 94.

²³² See for instance *Case of Akp nar and Altun v Turkey*, ECHR (2007), Appl No 56760/00.

²³³ *Case of Angelova and Iliev v Bulgaria*, *supra* note 231, § 96.

²³⁴ See for instance: *Case of McShane v United Kingdom*, ECHR (2002), Appl No 43290/98, § 95.

²³⁵ *Case of Angelova and Iliev v Bulgaria*, *supra* note 231, § 97

“The ECtHR does not specifically identify duties to prosecute and punish flowing from Article 2 of the Convention” but it interpreted Article 13 (the right to an effective remedy) to the effect that required investigations have to lead to the identification and punishment of those responsible.²³⁶ Finally, the duty to investigate is not limited to allegations of state violations of human rights—the states’ duties also apply with respect to cases attributable to private actors.²³⁷

As for the duty to prevent in the Inter-American System, the Court held early on that each state party has a

legal duty ...to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.²³⁸

Thus, the next state obligation, based on Article 25 of the ACHR,²³⁹ is to give citizens the access to “an effective remedy” and to investigate and prosecute the perpetrators of human rights violations. In the case *Fenelon v Haiti*, the IAComHR ordered a “complete and

²³⁶ *Case of Kaya v Turkey*, *supra* note 231, §§ 106-108. *Case of Ogur v Turkey*, ECHR (1999), Appl No 21954/93, § 88; *Case of McKerr v United Kingdom*, ECHR (1999), Appl No 28883/95, § 121. See also C. Hoppe, ‘Positive Human Rights Obligations of the Hiring State in Connection with the Provision of “Coercive Services” by a Private Military or Security Company’, *supra* note 208, at 125.

²³⁷ *Case of Osmanoglu v Turkey*, ECHR (2006) Appl No 48804/99, § 87. See also *Case of Kaya v Turkey*, *supra* note 231, § 91. In this case the Court did not have enough evidence to find “that agents of the [s]tate carried out, or were otherwise implicated in, the killing of the applicant's brother.” However, “that does not preclude the complaint in relation to Article 2 from being an ‘arguable’ one for the purposes of Article 13.” Thus, the reparation was awarded irrespective of whether the violation was committed by a state agent or a private actor who was “targeting individuals perceived to be acting against State interests with the acquiescence, and possible assistance, of members of the security forces” In C. Bakker, *supra* note 203, at 145.

²³⁸ *Ibid.* § 174.

²³⁹ ACHR, Art. 25: “Right to Judicial Protection: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.”

impartial investigation to determine where lies the responsibility for the actions denounced; [as well as] sanction[s for] those responsible for the denounced actions.”²⁴⁰

The Court has been forced to rule extensively on these matters, as governments have frequently ignored their obligation to prosecute human rights violations.²⁴¹ In the case of *Paniagua Morales et al v. Guatemala*, the Court noted that impunity is common in Guatemala and that

the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.²⁴²

In the Inter-American system, states also have the obligation to provide reparations. Any illegal act requires reparations with the objective of restoring the situation prevailing prior to the illegal act.²⁴³ The IACtHR has developed criteria for reparations for serious violations of human rights. Although financial compensation is the most common form of reparation, the Court has been creative in defining the victim to determine to whom reparation is due, as well as requiring alternate forms of reparation, such as public apologies and erection of monuments.²⁴⁴

Applying all of these obligations in the different systems of protection of human rights as relates to the different categories of states involved in the use of PMSCs may be challenging. There are some possible limitations of the application of these obligations in territorial states, and there may be complications with extraterritorial application of these obligations for contracting and home states.

²⁴⁰ *Case of Fenelon v Haiti*, IAComHR (March 9, 1982), Case No 6586, Report No 48/82, § 3. This formulation is repeated in several further cases, see for instance *Case of Pierre et al. v Haiti*, IAComHR (March 9, 1983), Case No 2646, Report No 38/82.

²⁴¹ H. Tigroudja and I. Panoussis, *La Cour interaméricaine des droits de l'Homme: Analyse de la jurisprudence consultative et contentieuse* (Brussels: Bruylant, 2003), at 165.

²⁴² *Case of Paniagua Morales et al. v Guatemala*, IACtHR (March 8, 1998) Series C No. 37, § 173.

²⁴³ *Case of Factory at Chorzów, Germany v Poland*, PCIJ [for ICJ] (1928), Indemnities, ¶ 47; see also *Case of Velásquez Rodríguez v. Honduras*, *supra* note 220, § 26.

²⁴⁴ See for instance, *Case of Manuel Cepeda-Vargas v Colombia*, IACtHR (26 May 2010) Series C, No 213, §§ 11–13; *Case of ‘Las Dos Erres’ Massacre v Guatemala*, IACtHR (November 24, 2009), Series C No 211, §§ 13–15; *Case of Chitay Nech y otros v Guatemala*, IACtHR (May 25, 2010), Series C 212, §§ 14–16.

3.2 Challenges to the application of these obligations

Human rights law permits certain rights to be suspended under certain circumstances, such as war or even situations of internal tensions. Any permissible suspensions, known as derogations, are contained in the derogation clause in each regime's respective convention.²⁴⁵ Nevertheless, there is another kind of possible limitation on the implementation of the obligations listed above—the duties to prevent, investigate, prosecute, and remedy—but whether and when such a limitation can be invoked depends on the type of state wishing to do so. As mentioned above, three types of states are involved in PMSCs' activities—territorial states, contracting states, and home states. A further consideration is whether the application of the human rights treaty is territorial or extraterritorial. This part focuses on the challenges posed to the territorial and extraterritorial applications of human rights obligations.

3.2.1. Territorial application

The application of the international obligations—the duties to prevent, investigate, prosecute, and remedy—at the territorial level may be challenged for different reasons. States may “formally derogate from their human rights obligations by invoking a derogation clause included in the different human rights instruments.”²⁴⁶ Apart from the legitimate derogation clause included in each human rights treaty, there are two other common scenarios in which states may try to limit the application of their obligations. Territorial states are “not always able (nor willing) to live up to their human rights obligations.”²⁴⁷ Furthermore, military occupation or other forms of effective control exercised in a state's territory by another state often complicates or precludes compliance with the obligations of the territorial state.²⁴⁸

A territorial state may be not responsible for the implementation of the international

²⁴⁵ See Art. 27 of the ACHR, Art. 15 of the ECHR, and Art. 4 of the International Covenant on Civil and Political Rights (adopted December 16, 1966; entered into force March 23, 1976) 999 UNTS 171 [hereinafter ICCPR].

²⁴⁶ C. Bakker, *supra* note 203, at 131.

²⁴⁷ W. Vandenhoe, *supra* note 202. See also C. Bakker, *ibid.*

²⁴⁸ C. Bakker, *ibid.*, at 130-135.

obligations to prevent, investigate, prosecute, and remedy if it is under military occupation or “effective control” of another state.²⁴⁹ The ECtHR emphasizes that “effective control” of a territorial area in a foreign state is “the main criterion for extraterritorial application of the [ECHR] whilst acts of state agents, exercising some authority or control may also constitute the basis for such an application.”²⁵⁰ The IACoHR also accepts that “effective control” gives rise to the extraterritorial application of the American Declaration and the American Convention; however, in this context “effective control” does not pertain to territory but to the acts of the state agents exercising authority or control in the foreign state.²⁵¹ Thus, in the event that there is “effective control,” “[t]he positive human rights obligations then temporarily pertain to the state exercising such control.”²⁵² As a result, the application of the relevant international law would be extraterritorial, similar to the way in which human rights obligations are applied to contracting and home states, analyzed below.

Similar to military occupation, “[t]he lack of institutional capacity often limits the de facto possibilities for the host state to comply with its positive human rights obligations.”²⁵³ The issue is that the evaluation of institutional capacity, or lack thereof, is subjective. It is difficult to assess to whether or not or to what extent a state is able to take certain measures.²⁵⁴ Indeed, “[t]o date, the monitoring bodies of the main human rights Conventions have not developed any specific criteria in this regard.”²⁵⁵

The Statute of International Criminal Court (hereinafter the Rome Statute) includes the notion of “inability” of the state to comply with certain obligations under international law. In Article 17(3), the Rome Statute states that “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to

²⁴⁹ The International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have provided clarification on the concept of “effective control,” which is discussed in the next chapter on state responsibility.

²⁵⁰ C. Bakker, *supra* note 203, at 133. Quoting *Loizidou v Turkey* (prel obj), EComHR (1995), Series A, vol 310, § 62; *Cyprus v Turkey*, Appl no 25781/94 (2001), § 77; and, *Cyprus v Turkey*, ECtHR Appl nos 6780/74 and 6950/75, EComHR, 26 May 1975.

²⁵¹ See for instance: *Case of Victor Saldaño v Argentina*, IACtHR (March 11, 1999), Petition, Report no 38/99; *Case of Coard and ors v US*, IACoHR, (September 29, 1999), Case No 10.951, Report No 109/99.

²⁵² C. Bakker, *supra* note 203, at 133.

²⁵³ *Ibid.*, at 132.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²⁵⁶ The Office of the Prosecutor at the ICC explained in a 2003 policy paper that

this provision was inserted to take account of the situations where there was lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.²⁵⁷

From this explanation, two elements are particularly relevant to justify the limitations on application of international obligations at the territorial level. First, a partial collapse of a national judicial system would not be considered a sufficient justification for a state to not comply with its obligations.²⁵⁸ Second, “the criteria of lack of central government” and a “state of chaos due to the conflict or crisis” are two useful elements for analyzing a state’s capacity to comply with its positive human rights obligations.²⁵⁹

3.2.2 Extraterritorial application

In practice, the contracting or home states may be in a better position to comply with the international obligations than the territorial state, largely because PMSCs often operate precisely in locations where the rule of law is deficient. Contracting states may exercise full control over PMSCs’ activities or the territory if it is under their control as an occupying power; home states may be better situated to regulate PMSCs’ activities from their territories. In those cases, the different international obligations mentioned above apply extraterritorially to the contracting or home states.²⁶⁰

Extraterritorial application of human rights law would occur if a non-territorial state held a non-state actor accountable for human rights violations that occurred in the territorial state.

²⁵⁶ Rome Statute of the International Criminal Court (adopted July 17, 1998; entered into force on July 1, 2002) 2187 UNTS 3, Art. 17 (3).

²⁵⁷ Paper on some policy issues before the Office of the Prosecutor, ICC-OTP 2003-4 September 2003, available at www.icc-cpi.int

²⁵⁸ C. Bakker, *supra* note 203, at 132.

²⁵⁹ *Ibid.*

²⁶⁰ The contracting state and the home state can be the same, in which case the same obligations will generally apply to two or three states simultaneously.

This theory is based on “[t]he duty to support human rights beyond the state’s national territory [...and] finds support in general international law... [because] [c]ustomary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another state.”²⁶¹

There is an “...obligation for every state knowingly not to allow the use of its territory and the conduct of persons subject to its jurisdiction to cause serious violations of human rights.” This also applies to contracting states, which have numerous positive obligations under IHRL.²⁶² Both contracting and home states are bound by this obligation. The hiring entity is supposed to have a close relationship with the hired PMSC: “while [states] spend the money, they are not free to ‘pass the buck’ with respect to responsibility.”²⁶³ Furthermore:

The home state has full control and jurisdiction over the PMSCs organized under its law and established in its territory. This territorial competence and effective control makes it possible for the home state to discharge its due-diligence duty in order to prevent, minimize, and redress human rights violations arising from the commercial export of military and security services.²⁶⁴

²⁶¹ O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, and I. Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, 34 *Human Rights Quarterly* (2012), at 1095. Quoting: Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941); see also the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the legality of threat or use of nuclear weapons, in which, referring to the principle that “damage must not be caused to other nations,” Judge Weeramantry considered the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country’s population, should be decided “in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July) (Weeramantry, J., dissenting).

²⁶² See H. Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, (Cambridge: Cambridge University Press, 2011). See also C. Hoppe, ‘Positive Human Rights Obligations of the Hiring State in Connection with the Provision of “Coercive Services” by a Private Military or Security Company’, *supra* note 208.

²⁶³ C. Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, *EUI Working paper, AEL* (2009).

²⁶⁴ F. Francioni, ‘The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors’ in F. Francioni and N. Ronzitti *supra* note 1, at 104. See also F. Francioni, ‘The Responsibility of the PMSC’s Home State for Human Rights Violations’, *EUI Working Papers AEL* (2009). This idea had also been developed in the context of environmental harm and multinational enterprises. It is based on the universalism of human rights that “entails an obligation for every state knowingly not to allow the use of its territory and the conduct of persons subject to its jurisdiction to cause serious violations of human rights. This is a typical due diligence obligation, not an obligation to ensure a given result.” See F. Francioni, ‘Export of environmental Harm by Multinational Enterprises: Can the State of Origin be Held Responsible,’ in F. Francioni and T. Scovazzi (eds) *International Responsibility for Environmental Harm*, (London: Kluwer Law International, 1991); F. Francioni, ‘Four Ways of enforcing the International Responsibility for Human rights Violations by Multinational Corporation’, in M. A. Moreau and F. Francioni, *La dimension pluridisciplinaire de la responsabilité sociale de l’entreprise*, (Aix-Marseilles: Presses Universitaires d’Aix-Marseille, 2007), at 154. See

The ECtHR has recognized the extraterritorial application of the Convention in exceptional situations.²⁶⁵ In the case of *Al-Saadoon and Mufdhi v United Kingdom*, the Court stated that, as the UK's armed forces entered Iraq and arrested the applicants, holding them in British-run detention facilities, the UK was under the obligation to protect the applicants' rights under Articles 2 and 3 of the ECHR.²⁶⁶ This statement confirmed the requirement contained in the ECHR to apply the obligation even outside the regional sphere of the Convention.²⁶⁷ In 2011, the ECtHR confirmed in the case *Al-Skeini and others v United Kingdom* that the Convention may apply "even outside the *espace juridique* of the Council of Europe."²⁶⁸ This could occur when state agents exercise authority and control over individuals within a territory upon which the state "exercises all or some of the public powers normally to be exercised by [the government of that territory]."²⁶⁹

The Inter-American System of Human Rights also accepted the extraterritorial application of the American Declaration and the American Convention in several cases.²⁷⁰ The first case (*Coard et al. v United States*) arose out of events that occurred during the occupation of Grenada by US forces.²⁷¹ Following the US invasion, the members of the junta, including its leader Bernard Coard, were detained and handed over to the Grenadian authorities for prosecution.²⁷² The Inter-American Commission adopted its final report on the matter on May 7, 1999, addressing the issue of extraterritorial application of the American Declaration even

also J. E. Viñuales, *Extraterritorial Tactics of Environmental Regulation*, in *Collected courses of the Academy of European Law* (Oxford University Press, forthcoming 2014).

²⁶⁵ *Case of Issa and ors v Turkey*, ECHR (2004), Appl No 31821/96, §§ 69–71; this position was reiterated in *Case of Ben el Mahi and ors v Denmark*, ECHR (2006), Appl No 5853/06, § 9; *Case of Mansur PAD and ors v Turkey*, ECHR (2007), Appl No 60167/00, § 53; *Case of Isaak and ors v Turkey*, ECHR (2006), Appl No 44587/98, § 19. The Issa judgment is also mentioned in *Case of Stephens v Malta (no 1)*, ECHR (2009), Appl No 11956/07, § 49.

²⁶⁶ *Case of Al-Saadoon and Mufdhi v United Kingdom*, ECHR (2010), Appl No 61498/08, § 140.

²⁶⁷ C. Bakker, *supra* note 203, at 131.

²⁶⁸ *Case of Al-Skeini and others v United Kingdom* ECHR (2011), Appl No 55721/07, §79. See also *Case of Al-Jedda v United Kingdom* ECHR (2011), Appl No 27021/08.

²⁶⁹ *Case of Al-Skeini and others v United Kingdom*, *Ibid.*, § 85 see also § 149-150. See also M. Milanovic, 'Al-Seini and Al-Jedda in Strasbourg', 23 (1) *EJIL* (2012) 121-139.

²⁷⁰ See C. M. Cerna, 'Extraterritorial application of the Human Rights Instruments of the Inter-American System', in F. Coomans and M. T. Kamminga, (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), at 147.

²⁷¹ *Case of Coard and ors v US*, *supra* note 251.

²⁷² *Ibid.*

though the parties had not raised it.²⁷³ The Commission held that:

under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – ‘without distinction as to race, nationality, creed or sex.’ Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. *While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad.* In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to *its authority and control*²⁷⁴

The Inter-American Commission adopted the same approach as that of the European Court in the *Loizidou v Turkey* and *Cyprus v Turkey* cases.²⁷⁵ It “refers to the idea of persons being brought within the jurisdiction of the state by the acts of its agents, which was developed by the European Commission on Human Rights.”²⁷⁶

In another instance, the IAComHR accepted a case on the basis of extraterritorial application of the American Declaration:

under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, “without distinction as to race, nationality, creed, or sex.” Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* Emphasis added.

²⁷⁵ M. Goundek, *The reach of Human rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009), at 145.

²⁷⁶ *Ibid.*

whether, in those specific circumstances, the state observed the rights of a person subject to *its authority and control*.²⁷⁷

Again following the European Court's decision in the *Cyprus v Turkey* case, which considers that state jurisdiction could be exercised over acts under the authority and control of the state, even outside that state's territory, the IAComHR explained:

The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996.²⁷⁸

In this case, the Inter-American Commission held Cuba responsible for violating the right to life and the right to fair trial of the victims.²⁷⁹

As mentioned above, territorial states bear the primary responsibility for human rights violations; however, in certain cases, as illustrated here, the extraterritorial application of human rights law may be more effective. The remaining issue is the process of attribution of the responsibility for international wrongful acts, discussed in the next chapter.

²⁷⁷ *Case of Armando Alejandro Jr. And Others v. Cuba (Brothers to the rescue)*, IAComHR (September 29, 1999), Case N° 11.589, Report N° 86/99, §23. Footnotes omitted.

²⁷⁸ *Ibid.*, §25.

²⁷⁹ *Ibid.*, §§ 38 – 52.

Chapter 4: International responsibility

As states and IOs are the two main subjects of the international system, they are the only entities that are subject to international responsibility in case of wrongful acts attributable to them. The ILC has recognized the formation of customary rules regarding the attribution of wrongful acts to both states and IOs.²⁸⁰ According to these customary rules, a PMSC's wrongful act can, under certain circumstances, give rise to international responsibility: for states this responsibility can arise from any action of a state official or organ, while an IO's accountability can be triggered by the conduct of its organs or agents. This section discusses the attribution of responsibility to states and IOs.

4.1 State responsibility

In principle, only the “internationally wrongful act of a [s]tate entails the international responsibility of that [s]tate”²⁸¹ and only conduct attributable to the state is an “act of state.”²⁸² In reality, however, the acts of persons or entities that are not state organs, according to domestic law of the state concerned, such as it is often the case with PMSCs, may still be imputable to the state under certain circumstances.²⁸³ Furthermore, state responsibility may arise even when no wrongful conduct is attributable to the state, but when the state fails to fulfill its due diligence obligation. This part discusses the different ways in which states may be held responsible for private conduct: attribution *de jure*, attribution *de facto*, and failure of the due diligence obligation.

²⁸⁰ ILC (53rd session), Draft articles on Responsibility of States for internationally wrongful acts (2001) UN Doc. A/56/10 [hereinafter ILC Draft Article on State Responsibility]; and ILC (63rd session), Draft articles on the responsibility of international organizations, (2011) UN Doc. A/66/10. [hereinafter ILC Draft Article on IOs Responsibility].

²⁸¹ ILC Draft Article on State Responsibility, *Ibid.*, Art. 1

²⁸² *Ibid.*, Art. 2 (a).

²⁸³ *Ibid.*, Art. 5 and 7.

4.1.1 Attribution *de jure*

Private conduct can be attributed to the state when the offending private entity was authorized to exercise elements of governmental authority.²⁸⁴ When this is the case, the nature of the activity is the key element for determining whether the conduct can be attributed to the state. The ILC, in its commentary on its Articles on State Responsibility, notes that the focus on the nature of the activity is meant to address the situation where private companies or para-statal entities exercise public functions.²⁸⁵ “The rationale [...] is that a state cannot evade its responsibility simply by transferring its functions to a private entity.”²⁸⁶ As a result, the logic accepted in international law is that:²⁸⁷

when, by delegation of powers, bodies act in a public capacity, eg, police an area [...] the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.²⁸⁸

The problem—which is particularly strong concerning PMSCs’ activities—is that there is no consensus on what constitutes the exercise of governmental authority.²⁸⁹ Indeed, one of the main sources of disagreement regarding the Draft Convention is that it attempts, in its Article 2, to define what the “inherently state functions” are²⁹⁰ when the reality is that there is no consensus among states on this point.²⁹¹

²⁸⁴ *Ibid.*, Art. 5

²⁸⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2003), Art 5, § 1.

²⁸⁶ C. Lehnardt, ‘Private military companies and state responsibility’, in S. Chesterman and C. Lehnardt, *supra* note 29, at 144.

²⁸⁷ ILC (26th session), Report of the International Law Commission (1974) UN Doc. A/9610/Rev, Chapter III, § 17.

²⁸⁸ German government, League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol III: Responsibility of States for Damage caused in their Territory to the Person or Person of Foreigners (Doc.C. 75.M.69.1929.V.), at 90 (J. Crawford, *supra* note 285, Art 5, § 4).

²⁸⁹ C. Lehnardt, *supra* note 286, at 144. She also notes that it is also “difficult to determine what PMC activities can be attributed to the state due to the uncertainty surrounding the range and nature of services offered by PMCs.”

²⁹⁰ Draft Convention on PMSCs *supra* note 11.

²⁹¹ Interview with Patricia Arias, *supra* note 183. See discussion in Chapter 2 on the UN Draft Convention.

4.1.2 Attribution *de facto*

In the event that the conduct of private actors does not constitute the exercise of governmental authority, it still can be attributed to the state if the private actor operated under state control or instructions.²⁹² Several courts have considered this question, starting with the International Court of Justice (ICJ) in the Nicaragua case in 1986. In this case, the Court considered that:

What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee ... was that the contras 'constitute(d) an independent force' and that the 'only element of control that could be exercised by the United States' was 'cessation of aid'. Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras' dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf ... even the general control of the respondent State with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.²⁹³

Ultimately, the ICJ held that “[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”²⁹⁴

By contrast, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case held that the actions of persons acting *de facto* on behalf of a state could be attributed to that state.²⁹⁵ According to the Court:

the control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or

²⁹² ILC Draft Article on State Responsibility, *supra* note 280, at Art. 8.

²⁹³ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ (27 June 1986), Judgment, §§ 109–15. Emphasis added.

²⁹⁴ *Ibid.*

²⁹⁵ *Prosecutor v Tadić*, ICTY (July 15 1999), Appeals Judgment, No. IT-94-1-A, §§ 116-119.

planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.²⁹⁶

A few years later, the ICJ contradicted this *Tadić* decision, stating that:

persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument.²⁹⁷

In short: the ICTY employs an “overall control” test, whereas the ICJ uses a “sending by or on behalf of” test.²⁹⁸

Even though the ICJ holding should be considered the current state of general international law on the topic, it is important to consider the context in which the activities of the private actors occurred to accurately evaluate the level of state control needed to attribute a wrongful act to it.²⁹⁹ As the ICTY Appeals Chamber has noted, the control required decreases with the increasing proximity of the controlling state to the territory where the private conduct takes place.³⁰⁰

Of course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur, or where at any rate the armed units or groups perform their acts, more and compelling evidence is required to show that the State is genuinely in control of the units and groups not merely by financing and equipping them, but also by generally directing or helping plan their actions ... Where the controlling State is the adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.³⁰¹

²⁹⁶ *Ibid.*, at § 137.

²⁹⁷ *Case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ (February 26, 2007), Judgment, § 392.

²⁹⁸ M. N. Schmitt, ‘Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework’, in M. Schmitt and J. Pejic, (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 157–95, at 187.

²⁹⁹ For instance, considerations such as the territorial state’s consent regarding a private actor’s activities may affect the evaluation of state control.

³⁰⁰ See also Vice-President’s Al-Khasawneh’s dissent in the *Case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 297, § 39.

³⁰¹ *Prosecutor v Tadić*, *supra* note 295, §§ 138–40. See also *Prosecutor v Delalic*, ICTY (February 20, 2001), Appeals Judgment, IT-96-21-A, § 47.

The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts also provide some helpful guidance for identifying the relationship between a PMSC and its sending state. According to the ILC, there are certain circumstances in which the wrongful act of a foreign organ, such as a PMSC, can be attributable to its home state. These circumstances arise when the foreign organ continues to act as part of and under the auspices of the home state and when there is no real functional link established with the beneficiary state.

Although considering a PMSC to be an organ of the home state would provide a way for attributing its actions to the home state, comments made on the ILC Draft Articles suggest that this is not a plausible interpretation. These comments assert that “...the conduct of private entities or individuals which have never had the status of an organ of the sending State” cannot be attributed to that state; “[f]or example, experts or advisers placed at the disposal of a State under technical assistance programs do not usually have the status of organs of the sending State.”³⁰² Furthermore, the comments require “that the organ placed at the disposal of a State by another State must be ‘acting in the exercise of elements of the governmental authority’ of the receiving State.”³⁰³ The result of this interpretation is that “[t]here will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State.”³⁰⁴

Given the likely difficulty of attributing a PMSC’s wrongful conduct to its home state, a final option—for generating state responsibility *without* attributing the act to the state—is if the private wrongful acts are accompanied by state actions or omissions.

4.1.3 Due diligence

Various international and regional courts have addressed the question of due diligence, explaining the steps states must take in order to prevent violations of international law.³⁰⁵ The

³⁰² E. David, *Principes de Droit des Conflits Armés* (4th edn, Brussels: Bruylant 2008), at 162.

³⁰³ *Ibid.*

³⁰⁴ ILC Draft Article on State Responsibility, *supra* note 280, Commentary (5) related to article 6, at 44.

³⁰⁵ Due Diligence: “reasonable steps taken by a person in order to satisfy a legal requirement, especially in buying or selling something” in Oxford Dictionary, *supra* note 51.

ICJ first discussed due diligence in the *Corfu Channel case*, in which the Court expressed uncertainty about if Albanian officials laid mines in Albanian waters that were damaging British vessels.³⁰⁶ However, the ICJ held, since “nothing was attempted by the Albanian authorities to prevent the disaster,” these “grave omissions involve the international responsibility of Albania.”³⁰⁷ The Albanian state failed to exercise due diligence to prevent or respond to a violation of international law.

States have the positive obligation to protect human rights and, as the European Court of Human Rights held, “the [s]tate cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.”³⁰⁸ The Inter-American Court of Human Rights has also addressed this question repeatedly, starting with the *Velásquez Rodríguez case*. In this case, the Court found Honduras responsible for the disappearance of Velásquez Rodríguez even though it was not possible to determine if Honduran officials were otherwise complicit in the act.³⁰⁹

The IACtHR has also held that “[i]t is a principle of international law that the [s]tate responds for the acts and omissions of its agents in their official capacity, even if they overstep the limits of their authority,”³¹⁰ and added

in these conditions, in order to establish whether a violation of the human rights established in the Convention has been produced, it is not necessary to determine, as it is in domestic criminal law, the guilt of the authors or their intention; nor is it necessary to identify individually the agents to whom the acts that violate the human rights embodied in the Convention are attributed.³¹¹

In another case the Court stated clearly: “[i]t is sufficient that a [s]tate obligation exists and

³⁰⁶ In 1946, mines close to the Albanian coast heavily damaged British ships. Britain requested reparations from the Albanian government, and its request denied. British government brought the case to the ICJ. See *Case of United Kingdom v Albania* (*The Corfu Channel case*), ICJ (April 9, 1949), Judgment (Merits).

³⁰⁷ *Ibid.*, § 4, 23.

³⁰⁸ *Case of Costello Roberts v United Kingdom*, ECHR (1993), Appl No 13134/87, § 27.

³⁰⁹ *Case of Velásquez Rodríguez v Honduras*, *supra* note 220, § 148.

³¹⁰ *Case of Mapiripán Massacre v Colombia*, *supra* note 27, § 108; and *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27, § 111. See also *Case of Gómez-Paquiyaury Brothers*, IACtHR (July 8, 2004), Judgment, Series C No. 110, § 72; and, *Case of the “Five Pensioners”*, IACtHR (February 28, 2003), Judgment Series C No. 98, § 63.

³¹¹ *Case of Mapiripán Massacre v Colombia*, *supra* note 27, § 110.

that the [s]tate failed to comply with it.”³¹²

It is accepted that states are, in principle, able to exercise their authority over their own territory. Thus, if a PMSC employee violates human rights or IHL, its conduct can create responsibility for the state where the wrongful act occurred. If the conditions of attribution are met, a similar situation may also generate responsibility for the contracting state—particularly in the case that the contracting state is an occupying power—for failing to prevent or respond to such conduct.³¹³ It is also possible that the home state could be found responsible for its lack of due diligence.³¹⁴ A similar mechanism of attribution exists concerning IOs.

4.2 International organizations’ responsibility

IOs—especially the UN and its specialized agencies—are common clients of PMSCs in different contexts.³¹⁵ As subjects of international law, IOs “are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are a party.”³¹⁶

And as the ILC stated in 2005, the same types of obligations that apply to states can apply to organizations.³¹⁷ However, the ICJ explained that “the rights and duties of an entity such as the organization must depend upon its purposes and functions as specified or implied in its

³¹² *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27, § 112.

³¹³ H. Tonkin, *supra* note 262. See also C. Hoppe, ‘Positive Human Rights Obligations of the Hiring State in Connection with the Provision of ‘Coercive Services’ by a Private Military or Security Company’, *supra* note 208.

³¹⁴ F. Francioni, ‘The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors’, *supra* note 264.

³¹⁵ See L. Pingeot, *Contracting Insecurity: Private military and security companies and the future of the United Nations*, Global Policy Forum and Rosa Luxemburg Foundation, February 2014, available at https://www.globalpolicy.org/images/pdfs/GPFEurope/PMSC_2014_Contracting_Insecurity_web.pdf; L. Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN*, Global Policy Forum and Rosa Luxemburg Foundation, June 2012, available at https://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf.

³¹⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ (1980), Advisory Opinion, §§ 89–90.

³¹⁷ ILC (57th session), Third Report on Responsibility of International Organizations (2005) UN Doc. A/CN.4/553.

constituent documents and developed in practice.”³¹⁸ PMSCs, even those working for IOs, do not always respect international human rights standards, as discussed and illustrated below in the case of Haiti.³¹⁹ As a result, PMSCs’ activities could, under certain circumstances, give rise to responsibility on behalf of the IO, through attribution of the wrongful act.

First, not all IOs’ work is of a character that might create human rights concerns—for instance, “[a] rhetorical organization, one discussing matters and adopting recommendations, will not normally violate international law.”³²⁰ However, an organization performing functions such as peace operations may raise concerns, and its behavior “will be bound by those general norms of international law that are customary as well as jus cogens.”³²¹ The consequence for these IOs is that “[t]here are situations in which [they] would be responsible under customary international law for the acts of their servants or agents, when they are acting in the performance of their functions, or of persons or groups acting under the control of organizations.”³²²

Although IOs’ international personality is no longer controversial, their responsibility in the event of wrongful acts is more complex to determine.³²³ There is always the question of whether the responsibility “lies with [the] organization or member states (or both).”³²⁴ This is particularly true in case of UN peace operations, where the troops are supplied by member states.³²⁵ The UN has accepted liability for unlawful acts committed by peacekeepers acting within their functions when the troops are under UN authority, command, and control,

³¹⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ (1949), Advisory Opinion, at 180.

³¹⁹ See Chapter Nine.

³²⁰ N. D White, ‘Institutional Responsibility for Private Military and Security Companies’, in F. Francioni and N. Ronzitti, *supra* note 1, at 385.

³²¹ *Ibid.*, citing the example of the UN’s failure to prevent genocide in Rwanda in 1994, which constituted a breach of an international obligation. ILC (57th session), Third Report on Responsibility of International Organizations (2005) UN Doc. A/CN.4/553, at 4.

³²² C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, (2nd edn, Cambridge: Cambridge University Press, 2005), at 72; H. G. Schermers and N. M. Blokker, *International Institutional Law*, (4th edn, Leiden: Martinus Nijhoff Publishers, 2003), at 400.

³²³ The similarity of between states’ and IOs’ personality and attribution of wrongful acts is, however, subject to debate. See A. Pellet, ‘International Organizations are Definitely not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations’, in M. Ragazzi (ed), *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie*, (Leiden: Martinus Nijhoff Publishers, 2013), at 41-54.

³²⁴ N. D White, ‘Institutional Responsibility for Private Military and Security Companies’, *supra* note 320, at 387.

³²⁵ *Ibid.*

“despite the fact that disciplinary competence and criminal jurisdiction over UN peacekeepers remains with the [troop-contributing nations].”³²⁶ For instance, Uruguay is responsible for the misconduct of its soldier during its mission in the UN intervention in Haiti.³²⁷ However, this should not mean that the IO could not also be responsible. The ICJ has stated that organizational immunity from local legal processes does not absolve the organization of its responsibilities.³²⁸ But the reality seems different: “[w]ith neither ordinary peacekeepers subject to UN military discipline (an essential component of ‘control’ not just accountability), nor fully under UN ‘command’, then the reality is that though there is UN ‘authority’ over peacekeepers there is only partial ‘command’ and ‘control.’”³²⁹

Recently, in 2011, the ILC submitted Draft Articles on the Responsibility of IOs to the General Assembly—these aimed to establish the rules to apply in order to attribute wrongful act to IOs. Following the ILC Draft Articles, an IO is responsible for the conduct of its organs and agents; under certain circumstances, this could include PMSCs’ activities.³³⁰ More specifically, Article 6 establishes the test for attribution: “the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.”³³¹

To attribute a PMSC employee’s wrongful act to the UN, it is necessary to consider the relationships between three actors—the UN, the territorial states and the PMSC’s employees. One option for attributing a PMSC’s action to the UN is if the PMSC’s employees are considered part of a UN organ.³³² Peacekeeping forces are considered subsidiary organs of the UN, thus, in the rare cases where PMSCs’ employees are contracted as peacekeepers, they

³²⁶ *Ibid.*

³²⁷ About the facts: M. Wesbrost, ‘Is this Minustah’s ‘Abu Ghraib moment’ in Haiti?’, *The Guardian* (September 3, 2011), available at <http://www.theguardian.com/commentisfree/cifamerica/2011/sep/03/minustah-un-haiti-abuse>.

³²⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ (1999), Advisory Opinion, § 88.

³²⁹ N. D White, ‘Institutional Responsibility for Private Military and Security Companies’, *supra* note 320, at 387.

³³⁰ ILC Draft Article on IOs Responsibility, *supra* note 280.

³³¹ *Ibid.*, Art. 6.

³³² *Ibid.*

could be considered part of a UN organ. However, this does not mean that the conduct of PMSCs' employees who are part of the mission fall under UN responsibility.³³³

Attribution of responsibility to UN is also possible in cases when PMSCs' employees can be considered UN agents.³³⁴ The term "agent of an international organization" is defined as "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."³³⁵ The current definition seems to be broad enough to include PMSCs hired by the organization.³³⁶ The activities of PMSCs' employees could be considered as "carrying out, or helping to carry out," one of the UN functions. However, some authors argue that "whether just any PMSC contracted by the UN is also an agent of the organization is questionable."³³⁷ This is because the UN General Conditions of Contracts for Services stipulate that the contractor's personnel "shall not be considered in any respect as being the employees or the agents of the United Nations."³³⁸

Because IOs have international personality, an IO can be held responsible for any wrongful act caused by the conduct of organs or agents under its authority, command, and control. As a result, under certain circumstances, the acts or omissions of PMSCs' employees could be attributable to an IO.

³³³ ILC (56th session), Second Report on Responsibility of International Organizations (2004) UN Doc. A/CN.4/541, § 35

³³⁴ The ICJ stated that international organizations are responsible for the conduct of the organ and agents. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 177; and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 328, § 66; see also C. Eagleton, *International Organizations and the Law of Responsibility* (Leiden: Brill, 1950), at 387.

³³⁵ ILC Draft Article on IOs Responsibility, *supra* note 280, Art. 2 (c)

³³⁶ N. D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', 19 *EJIL* (2008), 965-988, at 976.

³³⁷ C. Lehnardt, 'Peacekeeping', in S. Chesterman and A. Fisher, *supra* note 30, at 211.

³³⁸ General Conditions of Contract: Contracts for the Provision of Services, United Nations, revised January 2008, available at http://www.un.org/Depts/ptd/pdf/general_condition_services.pdf.

Chapter 5: PMSCs' direct obligations and responsibilities

The issue of PMSCs' direct obligations and responsibilities is part of the debate over applying international law, and particularly human rights law, to corporations. PMSCs' accountability depends on whether or not and to what extent these firms can be considered subject to obligations under international law. In a classical view, only states and IOs are subject to international law; however, several approaches permit the elaboration of certain obligations under international law for non-state actors. There are also several initiatives that aim to hold companies responsible; for example, an international code of conduct specifically focused on PMSCs goes even further through the creation of a monitoring mechanism. This chapter discusses the lack of subjectivity of non-state actors in international law, summarizes the several international initiatives that aim to improve corporate responsibility, and analyzes the development of the emerging norm on corporate responsibility.

5.1 Insufficiency of the traditional approach

The traditional approach considers only states and IOs as subjects of international law, leaving natural and legal persons bound solely by national law. By not considering companies to be subjects of international law, the international system fails to hold them accountable for harm caused by their activities. The issue of responsibility is thus shifted to the national level. However, corporate accountability also often fails at this level for different reasons. As discussed in this section, few countries have adequate legislation to address violations of human rights by corporations; even when they do, corporations are often able to avoid their responsibilities.

5.1.1 Limits on PMSCs' responsibility under international law

PMSCs often provide services in complex situations where human rights and humanitarian protections may be in danger. However, neither IHRL nor IHL, in their traditional application,

provides an option for holding a company responsible for its wrongful acts. In no situation does international law recognize PMSCs as subjects of international law; corporations are not recognized as subjects under either IHL or IHRL. Although corporations have the obligation to respect human rights, there is no mechanism to hold them accountable at the international level in the event they are involved in human rights violations.

5.1.1.1 International Humanitarian Law

IHL defines two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC).³³⁹ The categories of actors involved in armed conflicts depend on the type of conflict. For instance, in an IAC there are combatants, prisoners of war (POWs), and civilians; meanwhile, in a NIAC, there are just “parties” to the armed conflicts and the statuses of “combatant” and “POW” do not exist in NIAC.³⁴⁰

Regardless of the type of conflict, corporations are not addressed by IHL:

IHL does not foresee any particular status for corporate actors, such as PMSC. Except for the unlikely case where a PMSC, as such, becomes an independent non-state party to an armed conflict, its rights and obligations as a corporate actor therefore will not be defined by IHL, but by national law including, where applicable, corporate criminal law.³⁴¹

Thus, the discussion of PMSCs’ rights and obligations under IHL must focus on PMSCs’ employees, as individuals, rather than on the companies themselves.

³³⁹ International Committee of the Red Cross (ICRC), *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?*, Opinion Paper, March 2008, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

³⁴⁰ Common Article 3 to the Geneva Conventions: Geneva Convention I, *supra* note 147; Geneva Convention II, *supra* note 147; Geneva Convention III, *supra* note 147; Geneva Convention IV, *supra* note 147; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted June 8, 1977; entered into force December 7, 1978) 1125 UNTS 699 [hereinafter Protocol Additional II] composes the law of NIAC. The Four Geneva Conventions do not apply; thus, there is no POW or combatant status and it is the domestic law that governs the potential status of members of organized armed groups.

³⁴¹ Melzer, N., *Status of PMSCs under IHL, Summary of a presentation given on 7 September 2012 at the 35th Round Table on Current Issues of International Humanitarian Law, Private Military and Security Companies*, IIHL Sanremo, Italy, available at http://psm.du.edu/media/documents/reports_and_stats/think_tanks/iihl_melzer_status_2012.pdf. On this issue see also E.-C. Gillard, ‘Business goes to war: private military/security companies and international humanitarian law’, 88 (863) *Int’l Rev. of the Red Cross* (2006) 525, at 546.

A party to an armed conflict is a legitimate target to attack.³⁴² In most instances, a PMSC employee will not be considered a party to the conflict under existing law; if not, s/he is a civilian and is, thus, protected as civilian.³⁴³ A PMSC employee can be considered a party to an armed conflict if s/he is: 1) a member of the armed forces of a legitimate government, 2) a person belonging to an opposing armed group, or 3) a mercenary.³⁴⁴

To consider if a PMSC employee is a “member of the armed forces,” the first step is to understand how the term “the armed forces” is used both in IAC or NIAC. Article 43 of Additional Protocol I offers some elements of definition:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

[...]

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.³⁴⁵

The elements laid out in Article 43 are not sufficiently precise to determine if a PMSC employee forms part of the armed forces; however, it suggests that this outcome is a possibility when the PMSC is under a command responsible to the country that hired it.

³⁴² L., Doswald-Beck, ‘Private military companies under international humanitarian law’, in S. Chesterman and A. Fisher, *supra* note 30, at 130.

³⁴³ L. Vierucci, ‘Private Military and Security Companies in Non-international Armed Conflicts: Ius ad Bellum and Ius in Bello Issues’, in F. Francioni and N. Ronzitti, *supra* note 1, 247-256. Some authors argue that PMSCs should be analyzed not as parties to an armed conflict, but as unlawful combatants. However, the conclusion is that the discussion on this status is not helpful: the concepts of “unlawful combatants and PMSCs may be somehow useful as descriptive tools” however, the legal discussion is “leading to confusion rather than clarify into the interpretation of the current IHL regulation.” In V. Bílková, ‘Members of private military and security companies and/as Unlawful Combatants’, PRIV- WAR Working Paper European University Institute, 2009. On the definition of unlawful combatants see for instance: K. Dörmann, ‘The legal situation of “unlawful/unprivileged combatants”’ 85 (849) *Int’l Rev. of the Red Cross* (March 2003), 45–74.

³⁴⁴ Bílková proposes a fourth option: illegal combatants. However, she concludes that the concept, far from enriching the discussion on PMSCs, just unnecessarily complicates it. In V. Bílková, *Ibid.*

³⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted June 8, 1977; entered into force December 7, 1978) 1125 UNTS 3, Art. 43. [hereinafter Protocol Additional I].

In the event that a PMSC employee *were* a “member of the armed forces,” a group of such employees could be considered a militia or volunteer corps as defined in Article 4(2)(a)-(d) of the third Geneva Convention (Prisoner of War):

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.[...]³⁴⁶

PMSCs are able to meet these criteria only in a few specific instances. In general, although it is conceivable that a country could integrate PMSCs’ employees into its armed forces, this is unlikely: indeed, as discussed above, the interest of privatization is precisely the opposite.³⁴⁷

Another way that a PMSC employee could be considered a party to an armed conflict is if s/he belonged to an opposing armed group or insurgent group. Article 1 of Protocol II defines insurgent groups as:

[...] dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.³⁴⁸

A PMSC employee would belong to an armed group if: either s/he were a member of an armed group or the PMSC s/he worked for were itself an armed group. To date, there are no known cases of a PMSC employee forming part of an armed group in Latin America.³⁴⁹ Considering a PMSC to be an armed group would be possible if the company met the conditions of organization and ability to conduct military operations and potentially to control a delimited territory.

³⁴⁶ Geneva Convention III, *supra* note 147.

³⁴⁷ L., Cameron, ‘Private military companies and their status under international humanitarian law’, 88 (863) *Int’l Rev. of the Red Cross* (September 2006), 573-598.

³⁴⁸ Protocol Additional II, *supra* note 340, Art. 1.

³⁴⁹ The case of Yair Klein mentioned in Chapter 2 Section 1 could be considered a potential exception because he had a business; however, there were no legal contracts between his company and the armed groups.

The last possibility for considering a PMSC employee as a party to an armed conflict is if s/he is a mercenary. The definition of “mercenary” contained in the Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I) is in six cumulative points; for instance, a direct participation in hostilities, which is often difficult to prove.³⁵⁰ It also requires that a mercenary be “specially recruited locally or abroad in order to fight in an armed conflict.” Finally, the definition includes references to material compensation, which must be “substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party.”³⁵¹

This Article 47 definition of a mercenary is not useful to define the activities of contractors working in armed conflict.³⁵² Modern contracts for security or military services—such as those that PMSCs provide—are not likely to mention direct participation in an armed conflict. Furthermore, comparing the salaries of the different PMSCs’ employees is extremely complicated. For instance, Colombians employed by PMSCs in Iraq were paid between two and three thousand dollars monthly while Peruvian contractors earned one thousand and US contractors ten thousand dollars for equivalent work.³⁵³ This outcome is logical, given that the objective of this restrictive definition was to avoid that civilians would be considered as

³⁵⁰ Article 47—Mercenaries

2. A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

In Protocol Additional I, *supra* note 345.

³⁵¹ *Ibid.*

³⁵² See F. Hampson, *supra* note 123.

³⁵³ “Atrapados en Bagdad”, *Semana*, Bogotá, August 21, 2006.

mercenaries.³⁵⁴ However, the result is that the accepted definition of mercenaries in international law is under-inclusive.

Considering that PMSC employees do not, either *de jure* or *de facto*, fall into any of these categories in an armed conflict, in most cases PMSCs' employees are not parties to armed conflicts and should be classified, and protected, as civilians.³⁵⁵

Although IHL contains no definition of "civilian," it is generally accepted that civilians are people "who are neither members of state armed forces nor of organized armed groups and who do not otherwise participate in hostilities."³⁵⁶ This introduces a degree of complexity into considering PMSCs' employees as civilians because they *are*, in some cases, *de facto* participating in hostilities.³⁵⁷ This is true in Colombia, analyzed below. In the instance that PMSCs' employees participate in hostilities, they lose their protection and can be legitimate targets during their participation.³⁵⁸

As mentioned above, IHL does not anticipate a status for any corporate actors. As a result, any consideration of PMSCs in armed conflict requires a consideration of PMSC employees as individuals. In their personal capacity, PMSCs' employees have international obligations and can be subject to responsibility at the international level for their acts. Every individual in the world has the obligation to not commit crimes such as war crimes, crimes against humanity, or

³⁵⁴ J. Hagmann, and M. Kartas, 'International Organisations and the Governance of Private Security', in A. Bryden and M. Caparini, (eds), *Private Actors and Security Governance* (Geneva: Geneva Center for the Democratic Control of Armed Forces, 2006) 285-305, at 287.

³⁵⁵ J. Cockayne, 'Private Military and Security Companies', *supra* note 196. See also, L. Cameron, *supra* note 347.

³⁵⁶ N. Melzer, *Direct Participation in Hostilities and Membership in Organized Armed Groups*, Background Document Working Sessions IV and V, ICRC, (October 2005), at 8. See also N. Melzer, 'The Principle of Distinction Between Civilians and Combatants', in A. Clapham and P. Gaeta, *supra* note 196.

³⁵⁷ Hostilities should be understood as "offensive or defensive acts and military operations" in an armed conflict. In J. Quéguiner, 'Direct Participation in Hostilities under International Humanitarian Law', Working Paper Harvard University Program on Humanitarian Policy and Conflict Research (November 2003).

³⁵⁸ J.- M. Henckaerts, 'Étude sur le droit international humanitaire coutumier', 87 *Int'l Rev. of the Red Cross* (2005). "The notion direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict." In N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC (May 2009), at 70. See also M. Sossai, 'Status of Private Military and Security Company Personnel in the Law of International Armed Conflict', in F. Francioni and R. Ronzitti, *supra* note 1, at 204-206. See also: Report of the *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, University Centre for International Humanitarian Law, Geneva, 29–30 August 2005, 26–7; ICRC, 'Summary Report of Third Expert Meeting on the Notion of Direct Participation in Hostilities', Geneva, (October 2005).

genocide.³⁵⁹ “These obligations are not dependent on whether or not the individual acts through a state or non-state actor.”³⁶⁰ Thus:

there is no doubt that PMSC employees are to be considered responsible in their personal capacity for any act reaching the threshold of a war crime or a crime against humanity (including, for example, torture, rape, enslavement, etc), and may thus be subject, inter alia, to the application of the principle of universality of jurisdiction as well as—for the acts perpetrated in its personal and territorial scope of application—to the jurisdiction of the International Criminal Court (ICC).³⁶¹

5.1.1.2 International Human Rights Law

In situations that are not armed conflict, and thus IHL does not apply, the relevant international body of law is IHRL.³⁶² IHRL treaties are structured fundamentally differently than IHL. In IHL, there is an element of reciprocity between the different actors involved, and IHL is equally binding on all parties to an armed conflict, whether states or non-state actors.³⁶³ In IHRL, by contrast, only states are parties to human rights treaties, which has led the IACoMHR to reject the possibility that actors other than states could violate the ACHR:

The American Convention concerns the duties of States vis-à-vis the rights and freedoms of persons, the full and free exercise of which they must not only respect but also guarantee. The entire system for protecting human rights is designed on the basis of the State's acknowledgement of itself as a party to a fundamental legal contract on the matter of human rights and it is against the State that complaints alleging violation of the rights upheld in the Convention are brought.³⁶⁴

Nevertheless, even though the main human rights treaties only address states as duty holders,

³⁵⁹ A. Clapham, *The Rights and Responsibilities of Armed Non State Actors: The Legal Landscape & Issues Surrounding Engagement*, Geneva Academy of International Humanitarian Law and Human Rights (2010) available at <http://ssrn.com/abstract=1569636>.

³⁶⁰ *Ibid.*

³⁶¹ F. Lenzerini and F. Francioni, ‘The Role of Human Rights in the Regulation of Private Military and Security Companies’, in F. Francioni, and R. Ronzitti, *supra* note 1, at 55.

³⁶² As “the core of the Universal Declaration of Human Rights has come to reflect customary international law” IHRL applies in conflict and non conflict situation. In Y. Dinstein, *The Interaction Between Customary International Law and Treaties*, Vol. 322 RCADI, (The Hague: Brill, 2006) at 338.

³⁶³ L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), at 194.

³⁶⁴ *Annual Report of the Inter-American Commission on Human Rights 1990-1991*, IACoMHR (1991), OEA/Ser.L/V/II.79.rev.1.

it is necessary to recognize, as Clapham concludes, that it is not coherent *not* to grant international legal personality to corporations:³⁶⁵

As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.³⁶⁶

A way of avoiding the limitation of the doctrine of “subjects” is to focus directly on the scope of international norms and identify the beneficiaries of these norms without any conclusion in terms of subjectivity.³⁶⁷ Clapham has developed this approach in his work on human rights obligations of non-state actors, arguing that all actors should respect a norm when the international community considers it fundamental.³⁶⁸

However, states are not willing to confer international subject status on corporate entities. In 1986, Cassese explained:

Socialist countries are politically opposed to [corporate entities] and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible. It follows that multinational corporations possess no international rights and duties: they are only subjects of municipal and transnational law.³⁶⁹

A similar debate exists concerning another type of non-state actor: armed groups in armed conflict. States have been reluctant to acknowledge armed groups’ obligations under human

³⁶⁵ One exception is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The preamble states “Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard.” Article 4(1) also refers to armed groups, stating that “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” In Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, (adopted May 25, 2000; entered into force February 12, 2002) 2173 UNTS 222.

³⁶⁶ A. Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000), at 139, 190.

³⁶⁷ A. Bianchi, ‘Introduction: Relativizing the subject or subjectivizing the Actors: Is that the Question?’, in A. Bianchi, *Non-State Actors and International Law*, (Burlington: Ashgate Publishing Limited, 2009) at xvii.

³⁶⁸ A. Clapham, *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006).

³⁶⁹ A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at 103.

rights law because it could be seen as “granting such groups legitimacy, recognition or status under international law, and would therefore undermine the sovereignty of the state.”³⁷⁰

More generally, the main argument against imposing direct obligations on non-state actors is that it would strip the states of their responsibility to comply with their obligations under international law.³⁷¹ This would be negative because:

International law as a normative and political project is indissolubly linked to states, and non-state entities may not legitimately claim to form part of the system. Such a drastic way of thinking would probably lead to a greater marginalization of international law.³⁷²

However, past experience illustrates the interest of applying IHL and IHRL to states and non-state actors alike: the Guatemalan Commission for Historical Clarification applied common principles of international human rights law and international humanitarian law to the violent acts committed by the guerrillas in order “to give equal treatment to the Parties” and thus, extend access to justice for victims.³⁷³

Private actors may incur international responsibilities in some contexts but not under IHRL: corporations are subjects of international law with obligations and responsibilities in treaties not related to human rights.³⁷⁴ For instance, the UN Convention against Transnational Organized Crime of 2000 makes reference to the liability of legal persons;³⁷⁵ the UN Convention on the Law of the Sea applies its restrictions to natural and juridical persons as well as states;³⁷⁶ and the Convention on Civil Liability for Oil Pollution Damage provides for

³⁷⁰ J.-M. Henckaerts and C. Wiesener, ‘Human rights obligations of non-state armed groups: a possible contribution from customary international law?’, in R. Kolb and G. Gaggioli, (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing, 2013) at 151.

³⁷¹ C. M. Vázquez, ‘Direct vs Indirect Obligations of Corporations under International Law’, 43 *Columbia Journal of Transnational Law* (2005), 927-959.

³⁷² A. Bianchi, *supra* note 367, at xxvi.

³⁷³ Comisión de Esclarecimiento Histórico “Guatemala: Memoria del Silencio”. Quoted in *Case of ‘Las Dos Erres’ Massacre v Guatemala*, *supra* note 244. See also the UN Truth Commission on El Salvador held that the armed group *Frente Farabundo Martí para la Liberación Nacional* could have obligations under human rights law in areas under their control. In UN Commission on Truth in El Salvador, (April 1, 1993), UN Doc. S/25500, Annex, 20.

³⁷⁴ N. D. White and S. MacLeod, *supra* note 336, at 969.

³⁷⁵ Convention against Transnational Organized Crime, (adopted November 15, 2000; entered into force on September 29, 2003) 2225 UNTS 209.

³⁷⁶ United Nations Convention on the Law of the Sea (December 10, 1982, entered into force November 16, 1994) 1833 UNTS 397. Art. 137(1).

liability for pollution for the owner of the ship, whether a natural or legal person.³⁷⁷ Similarly, business corporations have the capacity to bring cases directly before the International Centre for Settlement of Investment Disputes under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.³⁷⁸

Thus, the development of international law tends to recognize certain rights and obligations for non-state actors, but there are no clear obligations for non-state actors regarding respect for human rights, apart from that they must comply with the laws of the country where they operate.³⁷⁹ As the International Law Association's Committee on Non-State Actors stated:

The consensus appears to be that currently NSAs [non-state actors] do not incur direct human rights obligations enforceable under international law. Exceptions include violations of jus cogens norms, the duty of insurgents to comply with international humanitarian law, and perhaps, 'legitimate expectations' of the international community that NSAs comply with certain norms, such as for organised armed groups to refrain from committing human rights abuses.³⁸⁰

However, even though non-state actors do not have directly enforceable human rights obligations, it is important

to bear in mind that the range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the will of states and the requirements of international intercourse.³⁸¹

Although no radical change in international law has yet occurred—and such may not be desirable—myriad international soft law initiatives concerning corporate responsibility have

³⁷⁷ International Convention on Civil Liability for Oil Pollution Damage, (November 29, 1969, entered into force June 19, 1975) 973 UNTS 3, Art. 1.

³⁷⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

³⁷⁹ P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in P. Alston, (eds) *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005), at 36.

³⁸⁰ International Law Association, Committee on Non-State Actors, First Report of the Committee, *Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, (2010), § 3 (2)

³⁸¹ H. Lauterpacht, 'The Subjects of International Law', in Lauterpacht, H., (ed), *International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works*, (Cambridge: Cambridge University Press, 1970), 136-150; reproduced in A. Bianchi, *Non-State Actors and International Law*, (Burlington: Ashgate Publishing Limited, 2009).

appeared in recent decades. These initiatives demonstrate the international community's growing concern about the lack of responsibility of multinational companies when they violate human rights.

5.1.2 Insufficient national mechanisms

The fact that only state and IOs are subjects of international law does not mean that there is no legal possibility for corporate accountability for human rights violations. PMSCs' conduct that gives rise to gross human rights abuses often violates domestic tort law or the law of non-contractual obligations, in common law and civil law jurisdictions, respectively. But civil compensation may not seem sufficient, given the nature of some of the violations committed by these companies. In many cases, PMSCs' conduct will also contravene international criminal law. Though it is possible in some countries to prosecute companies for these violations, this not yet the case at the international level. This part focuses on the existing civil and criminal proceedings, analyzing their limitations and shortcomings.

5.1.2.1 Civil liability for human rights violations by corporations

Tort law and the law of non-contractual obligations are intended to protect personal interests such as mental integrity, personal liberty, dignity, and property.³⁸² In all jurisdictions these bodies of law "have regulated the interactions of different actors, including businesses, in society, long before international human rights standards were developed."³⁸³ They allow victims access to the courts faster than in criminal proceedings³⁸⁴ and they are also likely, in a long-term perspective, to affect the companies by making them more socially responsible.³⁸⁵

³⁸² Commission of Jurists, *Corporate Complicity & Legal Accountability*, Volume 3, Civil Remedies, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, at 4.

³⁸³ Commission of Jurists, *Corporate Complicity & Legal Accountability*, Volume 2, Criminal Law and International Crimes, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, at 6. "In every jurisdiction, an actor can be held liable under the law of civil remedies if through *negligent* or *intentional conduct* it *causes harm* to someone else." See for instance *Codigo Civil Colombiano*, Art. 2341.

³⁸⁴ C. Staath, 'Universal Civil Jurisdiction as a Forum of Necessity for Victims of Corporate Human Rights Abuse', presented at the doctoral school of the Executive Seminar on Global Governance and Transnational

In considering PMSCs working in Latin America, the cases of the US and the UK are relevant because most PMSCs operating in the region are based in these two countries. Furthermore, both of these countries have legislation that provides domestic courts with jurisdiction over certain acts committed abroad by domestic actors.

The European Union Regulation on Jurisdiction (Brussels I) allows suing corporations domiciled in a European Union (EU) member state.³⁸⁶ Thus, national courts in the EU technically “have jurisdiction over any defendant corporation that is ‘domiciled’ in the EU, irrespective of where the harm occurred or the nationality of the plaintiffs.”³⁸⁷ However, within the EU there are only a few legal cases brought under this section of the law, and most of the cases occurred in the UK.³⁸⁸ In the UK, as is often the case, civil suits require a “territorial nexus”: “[a]n English court may exercise jurisdiction over foreign corporations not domiciled in the European Union as long as they have a place of business (a presence less than domicile) in England.”³⁸⁹ The complaint must generally allege that the UK-based company

Human Rights Obligations, Academy of Global Governance, European University Institute, Florence, December 2011.

³⁸⁵ J. Cockayne, ‘Make or Buy? Principal–Agent Theory and the Regulation of Private Military Companies’, in S. Chesterman and C. Lehnardt (eds), *supra* note 29, at 213–216.

³⁸⁶ Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 60, 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>.

³⁸⁷ J. Wouters and C. Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction’, Institute for International Law. Working Paper No 124 - July 2008, available at <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP124e.pdf>, at 4.

³⁸⁸ *Ibid.*, at 8. See also P-F Docquir and L. Hennebel, ‘L’entreprise titulaire et garante des droits de l’homme’, in Berns et al., *Responsabilités des entreprises et corégulation*, (Brussels: Bruylant, 2007) 79-145, at 139. See a list of cases brought before European domestic courts in C. Van Dam, ‘Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights’ 2 *Journal of European Tort Law* (2011) 221, at 234 and follow. Several of these cases have been dismissed by the European domestic courts: see for instance: in Switzerland, “Swiss prosecutors from the canton of Vaud announced on May 1, 2013, that it was declining to prosecute Nestlé S.A. and senior managers for alleged complicity in the murder of a trade unionist by paramilitaries in Colombia”. In A. Herzberg, ‘Kiobel and Corporate Complicity—Running with the Pack’, *AJIL Unbound, Agora: Reflections on Kiobel*, 2014, at 40-48. In Netherlands “in March 2010, Al Haq filed a criminal complaint in the Netherlands against the Dutch company Riwal for alleged complicity “in the commission of war crimes and crimes against humanity [...] In May 2013, however, the prosecutor decided that it would not take legal action against the crane lessor or its directors on account of mootness: the company had stated that it was no longer working in Israel and the West Bank.” [Al Haq, Criminal Complaint Lodged Against Dutch Company for Construction of Settlements and ‘The Wall’ (Oct. 14, 2010), at <http://www.alhaq.org/advocacy/targets/accountability/71-riwal/472-criminal-complaint-lodged-against-dutch-company-for-construction-of-settlements-and-the-wall>.] In A. Herzberg, *Ibid.*

³⁸⁹ A. Sanger, Corporations and Transnational litigation: Comparing Kiobel with the Jurisprudence of English Court, *AJIL Unbound* (2014), p. e23-30 quoting: Civil Procedure Rules 1998, S.I. 1998/3132, pt. 6 (UK),

has “neglected its statutory or unwritten duty of care *vis à vis* the operations of its overseas subsidiaries, branches or plants” based on the theory that, “while the harm itself may have occurred abroad, the wrongful behavior occurred within the territory” of the home state.³⁹⁰

British judges must hear these cases unless the doctrine of *forum non conveniens*, which allows the court not to hear a case despite having jurisdiction, applies.³⁹¹ In order to refuse to hear a case on *forum non conveniens* grounds, a court must determine whether another court is better able to handle the litigation. To do this, British judges first take into account the interests of the parties and the nature of the complaint.³⁹² Then they assess whether or not the other forum resolves disputes with substantive justice.³⁹³ For instance, in the case *Lubbe contre Caple plc*, the company Thor Chemicals was accused of negligence for failing to take adequate measures to ensure that its South African subsidiary ensured workplace security and safety for prevention of asbestos exposure-related diseases.³⁹⁴ Upon considering the facts, the House of Lords ruled unanimously that although South Africa was the most appropriate forum for the hearing of the application, it was likely that legal representation for the plaintiffs was not available and that they would not have the possibility to file a class action, which would result in a denial of justice.³⁹⁵ As a result, the UK retained jurisdiction over the case. Thus, like other UK companies, UK PMSCs could be sued for civil damages in UK courts. However, to date there are only two reported cases involving British PMSCs and they concern PMSCs’ employees who have sought compensation for damages suffered.³⁹⁶

It is possible in the US, too, to seek civil liability for corporations. Tort claims have been initiated principally under national (federal) law—more specifically, under the Alien Tort

available at <http://www.legislation.gov.uk/ukxi/1998/3132/made> §§ 6.2, 6.5; Companies Act 2006, c.46 (UK), available at <http://www.legislation.gov.uk/ukpga/2006/46>.

³⁹⁰ J. Wouters and C. Ryngaert, *supra* note 387, at 8.

³⁹¹ P-F. Docquir and L. Hennebel, *supra* note 388, at 139.

³⁹² *Case of Lubbe and Others and Cape Plc. and Related Appeals*, HL (2000).

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*; See also *Connelly v. RTZ*, 1998, AC 854, HL, 872. See S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford, Portland, and Oregon: Hart Publishing, 2004), at 113.

³⁹⁶ *Case of Harty v Sabre International Security Ltd and another*, EWHC (2011); *Case of Davies v Global Strategies Group (Hong Kong) Ltd and another*, EWCA (2010). See R. DeWinter-Schmitt, *supra* note 134, at 113.

Statute (ATS) and the Torture Victims Protection Act (TVPA).³⁹⁷

Under state law, claims against PMSCs have been filed as a result of PMSC treatment of detainees,³⁹⁸ participation in extraordinary rendition,³⁹⁹ firing on vehicles,⁴⁰⁰ firing into crowds,⁴⁰¹ and engaging in physical attacks against civilians.⁴⁰² “In these cases, civilian plaintiffs have brought multiple types of tort claims, including assault and battery, sexual assault and battery, wrongful, death, intentional infliction of emotional distress, false imprisonment, and negligence.”⁴⁰³

The ATS, which dates from 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁰⁴ The ATS was seldom used until 1980, when the Court held in the *case of Filártiga v Peña-Irala* that a US court has jurisdiction to hear “any civil action by an alien for a tort only, committed in violation of the law of nations.”⁴⁰⁵ For a time, the ATS was seen as the best option to sue companies in the US for their actions abroad.⁴⁰⁶ However, the *Kiobel* case has dampened enthusiasm about the ATS’ potential

³⁹⁷ R. DeWinter-Schmitt, *ibid.*, at 96-102.

³⁹⁸ See, e.g., *Case of Al-Quraishi v L-3 Servs., Inc.*, 657 F.3d (4th Cir. 2011) (Abu Ghraib and other prisons throughout Iraq); *Case of Al Shimari v CACI Int’l, Inc.*, 1:08-CV-827 GBL/JFA, 2013 WL 3229720 *1 (E.D. Va. June 25, 2013). This decision is currently on appeal with briefs filed in October and November 2013. *Al Shimari v. CACI Int’l, Inc.* Case No. 13-02162 (4th Cir.) (Abu Ghraib prison, Iraq); *Case of Saleh v Titan*, 580 F. 3d (D.C. Cir. 2009). (Abu Ghraib prison, Iraq).

³⁹⁹ See *Case of El Masri v U.S.*, 479 F.3d (4th Cir. 2007).

⁴⁰⁰ See *Case of Estate of Manook v. Research Triangle Institute, Int’l and Unity Resources Group, L.L.C.*, 693 F. Supp. 2d (D.D.C. 2008). (Firing on vehicle).

⁴⁰¹ *Case of re XE Alien Tort Litigation*, 665 F. Supp. 2d (E.D. Va. 2009) at 574 (firing into Al Watahba Square in Baghdad, case no. 1:09cv616; firing into Nisoor Square in Baghdad, case no. 1:09cv617).

⁴⁰² *Ibid.*, at 574, 576 (shooting Iraqi civilian coming from party, case no. 1:09cv615; beating photographer who took picture of American dignitary, shooting and killing Iraqi security guards, case no. 1:09cv618).

⁴⁰³ R. DeWinter-Schmitt, *supra* note 134, at 98, quoting: *Case of Al Shimari v CACI Int’l, Inc.*, 728 F. Supp. 2d (4th Cir. 2012). (assault and battery, sexual assault and battery, intentional infliction of emotional distress, negligence); *Case of Ibrahim v. Titan Corp.*, 391 F. Supp. 2d (D.D.C. 2005). (assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, negligence).

⁴⁰⁴ Alien Tort Claims Act, 28 U.S.C.A. § 1350.

⁴⁰⁵ *Case of Filártiga v Peña-Irala*, 630 F.2d (2d Cir 1980). See B. Stephens, ‘Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’, 27 (1) *Yale Journal of International Law* (2002). Companies could be sued if they have a link with the US (see *Case of Kadic v Karadzic*, 70 F.3d (2d Cir. 1995).

⁴⁰⁶ N. Jägers, K. Jesse, and J. Verschuuren, ‘The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell’, *AJIL Unbound* (2014), 36 – 41, p. e37.

usefulness.⁴⁰⁷ In directing that the *Kiobel* case be dismissed, the US Court of Appeals for the Second Circuit stated that “corporate liability is not a discernible—much less a universally recognized—norm of customary international law.”⁴⁰⁸ This decision created a conflict among the circuits over whether ATS suits could be brought against corporations, leading the Supreme Court to agree to review the case.⁴⁰⁹ In April 2013, the Supreme Court affirmed the Second Circuit's decision, 5-4.⁴¹⁰ The majority applied the “presumption against extraterritoriality,” meaning that US laws do not apply to conduct abroad, and rejected that “the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”⁴¹¹

The Supreme Court concluded that:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. (slip op. at 17-24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.⁴¹²

The *Kiobel* decision is likely to significantly reduce international human rights litigation in the US;⁴¹³ if it left open the door for corporate liability at all, it has limited jurisdiction for conduct abroad.⁴¹⁴ The *Kiobel* decision has already been applied in a case against a PMSC, but this decision is on appeal.⁴¹⁵

⁴⁰⁷ “In *Kiobel*, twelve Nigerian citizens who had obtained political asylum in the United States brought suit against Dutch and British oil companies, alleging that, through their Nigerian subsidiary, the companies had aided and abetted human rights violations committed by the Nigerian military in the 1990s. The defendants' Nigerian subsidiary was specifically alleged to have provided transportation to Nigerian forces; allowed their property to be utilized as a staging ground for attacks; provided food for soldiers involved in the attacks; and provided compensation to those soldiers. In directing that the case be dismissed, the U.S. Court of Appeals for the Second Circuit held broadly that private corporations could not be sued under the ATS.” In C. A. Bradley, ‘Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries’, *ASIL insights* (April 18, 2013).

⁴⁰⁸ *Case of Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

⁴⁰⁹ C. A. Bradley, *supra* note 407.

⁴¹⁰ *Case of Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Sup. Ct. April 17, 2013), at 5.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*, at 14.

⁴¹³ C. A. Bradley, *supra* note 407, at 5.

⁴¹⁴ A. Chander explains “*Kiobel* favors foreign corporations over both human rights plaintiffs and American corporations. *Kiobel* does not spell the death of human rights litigation in U.S.” In A. Chander, ‘Unshaling

Another option to sue PMSCs for tort liability in the US is under the TVPA. The TVPA was enacted in 1992 and is “not jurisdictional in nature, but rather creates a substantive cause of action.”⁴¹⁶ Claims under TVPA have not been very successful. Courts have interpreted the TVPA as requiring “official action” and thus “have generally declined to conclude that PMSCs were engaged in state action.”⁴¹⁷

Notwithstanding the promise and limitations of the ATS and TVPA, considering the seriousness of the human rights violations that companies can commit, civil compensation cannot be considered sufficient and the possibility of criminal liability must be explored.⁴¹⁸

5.1.2.2 Corporate criminal liability

Traditionally, companies have not been subject to criminal liability.⁴¹⁹ However, criminal law included corporate responsibility for the first time in Article 6 of the Statute of the Nuremberg Military Tribunal.⁴²⁰ Corporations have been increasingly key players and have been involved in severe incidents, such as the 1984 disaster at Bhopal in India in which more than three thousand people were killed and tens of thousands injured.⁴²¹ “This expansion of the power of

Foreign Corporations: Kiobel’s Unexpected Legacy’, 107 *The American Journal of International Law* (2013) 829-834, at 829.

⁴¹⁵ *Case of Al Shimari v CACI Int’l, Inc.*, *supra* note 398.

⁴¹⁶ Torture Victim Protection Act of 1991, Pub. L. No. 102-256.

⁴¹⁷ R. DeWinter-Schmitt, *supra* note 134, at 98; quoting: *Case of Estate of Manook v. Research Triangle Institute*, *supra* note 400, at 19-20; *Case of Saleh v Titan*, *supra* note 398. (Affirming dismissal of ATS claims, holding that statute is ambiguous as to whether private actors are liable for torture).

⁴¹⁸ R. Grondin, ‘La responsabilité pénale des personnes morales et la théorie des organisations’, 25 *Revue générale de droit* (1994) at 379-402.

⁴¹⁹ C. Wells, *Corporate Criminal Liability*, Paper written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, at 33; in *Corporate Complicity & Legal Accountability*, Volume 2, *supra* note 383.

⁴²⁰ Charter of the International Military Tribunal (adopted on 8 August 1945) 82 UNTS 280, Art. 6; See also A. Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations’, 20 (1) *Berkeley Journal of International Law* (2002), 91-159.

⁴²¹ For an overview of the Bhopal disaster, see Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years on*, (2004), available at <http://www.amnesty.org/en/library/asset/ASA20/015/2004/en/fa14a821-d584-11dd-bb24-1fb85fe8fa05/asa200152004en.pdf>. See other cases such as *Trafigura: Amnesty International United Kingdom, Trafigura, Ivory Coast: toxic waste dump victims pin hopes on 19 November appeals*, November 12, 2009 and the activity of Total and Chevron in Myanmar documented in Earth Rights International, *Total Impact:*

corporations has also presumably influenced the legal strengthening of the idea, echoed by courts, that corporations can violate or substantially contribute to the violation of human rights.”⁴²² The international system has also been slow to embrace this change because companies are still not subjects of international law, as discussed above.

One of the main challenges of criminal liability for corporations is that, while employees or representatives of companies could in some cases be pursued and incarcerated individually, there is no option to imprison a legal person.⁴²³

Among common law jurisdictions, “Australia’s Criminal Code is perhaps the most permissive and elaborates that fault may be attributed to a ‘body corporate that expressly, tacitly, or impliedly authorized the commission of a criminal offence.’”⁴²⁴ Similarly, in the UK, companies may be held liable for the criminal acts of their employees but “generally cannot be held criminally liable when employees commit an offence that falls outside of the scope of their employment or authority.”⁴²⁵ Meanwhile, in the US, “[w]hat currently exists is a patchwork of statutes that allows, in some instances, for the possibility of prosecution of PMSC personnel, but not PMSCs, either in federal civilian or military courts.”⁴²⁶

The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Rules Burma (Myanmar), April 2008, available at

<http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/publications/total-impact.pdf>. See also the example of the service of geolocalization by Google (Street View), which raised several worries. The justice system intervened in Greece and Switzerland: ‘Greece puts brakes on Street View’, *BBC News* (May 12, 2009), and ‘Switzerland takes Google to Court’, *BBC News* (November 13, 2009).

⁴²² J.-P. Bohoslavsky and V. Opgenhaffen, ‘The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship’, 23 *Harvard Human Rights Journal* (2010), at 164. See also A. McBeth, ‘Holding the Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses’, 23 *Netherland Quarterly Human Rights* (2005), at 20.

⁴²³ For instance, a Dutch citizen was convicted of complicity in violations of the laws and customs of war. Frans Cornelis Adrianus Van Anraat provided chemical equipment to the Iraqi regime of Saddam Hussein in the 1980s, which was used to make mustard gas. Van Anraat was sentenced to seventeen years in jail. This example illustrates that international criminal law may also apply to businesspersons. For an analysis of this case see A. Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’, 6 *Journal of International Criminal Justice*, 2008, at 912. See also A. Ramasastry and R. C. Thompson, *Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries – Executive Summary*, Fafo-report, (2006).

⁴²⁴ “Australia’s Criminal Code is perhaps the most permissive and elaborates that fault may be attributed to a ‘body corporate that expressly, tacitly, or impliedly authorized the commission of a criminal offence.’” In A. Ramasastry and R. C. Thompson, *Ibid.*, at 13.

⁴²⁵ See *Corporate Prosecutions*, Crown Prosecution Service § 11 & 12, available at http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/; R. DeWinter-Schmitt, *supra* note 134, at 111.

⁴²⁶ R. DeWinter-Schmitt, *Ibid.*, at 90.

Despite initial resistance, civil law jurisdictions have already experienced a legal evolution on this issue. For instance, Belgium, France, and the Netherlands have adopted legislation recognizing that businesses, like people, can face criminal prosecution.⁴²⁷ Those examples illustrate that it is possible to make criminally accountable enterprises at the national level in a civil legal system, such as Colombia, Mexico, and Haiti.⁴²⁸

Corporate liability—both civil and criminal—can be considered to be in development, but to date international law and most national legislation have failed to effectively hold corporations responsible when they violate human rights.

5.2 An emerging norm of corporate responsibility

⁴²⁷ “Belgian law requires companies to designate a responsible person who bears automatic criminal liability for any crimes that occur in the course of business activity, without the necessity of proving any illegal activity on his or her part. The designee in turn, receives extra compensation and reimbursement for criminal fines imposed.” In *Corporate Complicity & Legal Accountability*, Volume 2, Criminal Law and International Crimes, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, at 57. Quoting Celia Wells, “Corporate Criminal Liability”, Paper written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, p. 34-35. In France The law n° 2004-204 (March 9, 2004) Art. 54 published in the *Journal Officiel* on March 10, 2004, and put in force on December 31, 2005 states: “Les personnes morales, à l'exclusion de l'état, sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, des infractions commises, pour leur compte, par leurs organes ou représentants. Toutefois, les collectivités territoriales et leurs groupements ne sont responsables pénalement que des infractions commises dans l'exercice d'activités susceptibles de faire l'objet de conventions de délégation de service public. La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits, sous réserve des dispositions du quatrième alinéa de l'article 121-3.” See also the “Mémorandum du Ministère des affaires étrangères française: Criminal liability of private law legal entities under French law and extra-territoriality of the laws applicable to them: Review of the situation and discussion of issues,” available at http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/Resources/documents/Criminaliabilityoflegalentities050606_000.doc, at 3. In the Netherlands: Criminal Code, Art. 51, since 1976.

⁴²⁸ In Colombia, there is no standard of criminal law that recognizes legal persons. However, the Constitutional Court held that criminal liability of legal persons is not inconsistent with the Constitution, if the law were sufficiently precise and provided a proper procedure. (See Corte Constitucional Colombiana, sentencia C-320 de 1998 (M.P. Eduardo Cifuentes Muñoz), available at <http://www.corteconstitucional.gov.co>. It is therefore possible that the Colombian Congress would create corporate criminal liability with its appropriate procedure. (See Comisión Internacional de Juristas, *Acceso a la Justicia: Casos de Abusos de Derechos Humanos por Parte de Empresas, Colombia*, (2010), available at www.icj.org, at 13). In Mexico, there is no corporate criminal liability; nevertheless there are “regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees.” in A. A. Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations*, paper submitted within the mandate of the UN Special Representative of the Secretary-General on Business and Human Rights, (2008), at 4. There is no law in Haiti that contemplates corporate criminal responsibility.

In light of the limited opportunities for holding corporations directly liable for violations of international law, several international initiatives have emerged as alternative mechanisms of accountability. None of these initiatives are binding under international law; however, they constitute an evolution of existing norms toward holding corporations accountable for their human rights violations.

In international law and domestic law, the question of the sources of law and their hierarchy is fundamental for determining the legal value of any document.⁴²⁹ There are two categories of law: the binding law, known as “hard law,” and the non-binding law, called “soft law.”

Hard law consists first and foremost of treaties—those countries that sign on to a treaty are bound by it. Soft law “explores and clears new areas of legal regulation.”⁴³⁰ The main advantage of soft law lies in its flexibility: soft law includes “...voluntary standards and guidelines which leave their recipients a margin of appreciation without committing a wrongful act entailing responsibility if they ultimately fail to comply [the voluntary standards].”⁴³¹ These instruments represent a first step towards redefining expected behaviors to therefore extend the empire of law. This is because another primary source of international law is customary international law, which is “evidence of a general practice accepted as law.”⁴³² Because soft law encourages states to develop new regulations, as well as to refine the

⁴²⁹ Formal sources of law refer to the historical origin of the rule, the political basis of its authority, and the linguistic support for its formulation. Sources are a key paradigm of law. The solution of any legal question now necessarily involves the investigating, analyzing, and referencing sources, which constitutes the bulk of the legal method. In international law, Article 38 of the Statute of the International Court of Justice states: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” In Statute of the International Court of Justice (adopted on 26 June 1945) 993 UNTS 25 (ICJ Statute), Art. 38. See also B. Frydman and G. Lewkowicz, *Les codes de conduite: source de droit global?*, Working Papers du Centre Perelman de Philosophie du Droit, (2012), at 4.

⁴³⁰ G. Abi-Saab, *Cours Général de Droit International Public* (Leiden: Martinus Nijhoff Publishers, 1996), at 210.

⁴³¹ H. Thierry, *L'évolution du droit international: Cours general de droit international public* (Leiden: Martinus Nijhoff Publishers, 1991), at 70. Author's translation.

⁴³² ICJ Statute, *supra* note 429, Art. 38.

content of existing standards, it can promote and speed up the creation of customary international law, which *is* a binding source of law.⁴³³

The lack of formal mechanisms at the international level to address potential wrongful conduct by multinational companies has led to the emergence of several international initiatives aimed at improving companies' respect for human rights. The most significant general initiatives are the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,⁴³⁴ the United Nations Global Compact,⁴³⁵ and the UN "Protect, Respect and Remedy" framework.⁴³⁶ More specific international initiatives have also developed addressing more specific topics,⁴³⁷ including the phenomenon of PMSCs (the International Code of Conduct [ICoC]), and creating mechanisms of supervision and monitoring which, with adequate state support, could further crystallization of the soft law on corporate responsibility.⁴³⁸

5.2.1. OECD Guidelines for Multinational Enterprises

In response to concerns about the activities of subsidiaries of European and North American multinational companies, the OECD adopted the Guidelines for Multinational Enterprises (hereinafter the Guidelines) in 1976.⁴³⁹ The Guidelines include principles and standards that states members of the OECD negotiated and to which they voluntarily committed in order to promote their businesses.⁴⁴⁰ It is therefore a list of good practices that companies are expected

⁴³³ G. Abi-Saab, *supra* note 430, at 210.

⁴³⁴ See Organization of Economic Cooperation and Development (OECD), Guidelines for Multinational Enterprises available at <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> [hereinafter OECD Guidelines].

⁴³⁵ UN Global Compact, available at <http://www.unglobalcompact.org/>.

⁴³⁶ J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, (April 7, 2008), available at <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf>, §2. [hereinafter *Framework: Protect, Respect and Remedy*]

⁴³⁷ See for instance the Kimberly process and the Voluntary Principles on Security and Human Rights, available at www.voluntaryprinciples.org/.

⁴³⁸ International Code of Conduct For Private Security Service Providers, (November 9, 2010), available at www.icoc-psp.org. [hereinafter ICoC].

⁴³⁹ See OECD Guidelines, *supra* note 434.

⁴⁴⁰ *Ibid.*

to meet, both nationally and internationally, in the context of a globalized economy.⁴⁴¹ The Guidelines were updated in 2000 and 2011 and now cover some sensitive areas within business ethics,⁴⁴² as well as topics such as the fight against corruption,⁴⁴³ environmental concerns,⁴⁴⁴ and the notion of contribution to local communities.⁴⁴⁵ The new (2011) version of the Guidelines added a specific chapter on human rights and was positively reviewed by human rights defenders at Amnesty International: “the new text clearly and unambiguously establishes that enterprises should respect human rights wherever they operate. It explicitly states that enterprises should avoid causing or contributing to human rights abuses, and should put in place and implement adequate human rights due diligence processes to ensure this.”⁴⁴⁶

In the framework of these Guidelines, states must establish national contact points.⁴⁴⁷ These offices have the function of mediating between the parties to any dispute concerning corporate responsibilities.⁴⁴⁸ They also work on the clarification of the Guidelines.⁴⁴⁹

However, these principles have been the subject of several critiques related to their effectiveness. The Guidelines are not legally binding and their implementation through national contact points is considered by some to be ineffective.⁴⁵⁰ Indeed, “[u]nder the OECD Guidelines, the only incentive for companies to comply resides in the adverse publicity they will be subjected to if they refuse to cooperate to identifying a solution to the ‘specific instance’ presented to a national contact point.”⁴⁵¹

⁴⁴¹ P. T Muchilinski, ‘Human Rights and Multinationals – Is There a Problem?’ 77 *International Affairs* (2001), at 31.

⁴⁴² OECD Guidelines, *supra* note 434, Part IV.

⁴⁴³ *Ibid*, Part VII

⁴⁴⁴ *Ibid*, Part VI

⁴⁴⁵ *Ibid*, Principle 3, at 16.

⁴⁴⁶ Amnesty International, *The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation*, May 23, 2011, available at <http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf>

⁴⁴⁷ *Ibid*, at 78.

⁴⁴⁸ *Ibid*.

⁴⁴⁹ J. Cernic, ‘Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises’, 4 (1) *Hanse Law Review* (2008), at 84.

⁴⁵⁰ O. De Schutter, *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05, Symposium – Transnational Corporations and Human Rights, NYU School of Law (2005).

⁴⁵¹ *Ibid*.

None of the revisions of the Guidelines over the years have addressed this criticism: the role of national contact points has not been clarified and their powers remain the same.⁴⁵² There are still no penalties for companies that do not comply with the Guidelines or refuse to engage in mediation proposed by the national contact points.⁴⁵³ Finally, these national contact points have no minimum requirement to ensure the effectiveness of their procedures.⁴⁵⁴ These failures may prejudice the improvements made in the revisions of the document and tarnish its credibility as a whole.⁴⁵⁵

5.2.2 United Nations Global Compact

Like the Guidelines, the United Nations Global Compact represents another attempt by an international organization to take the lead in improving regulation of corporations. The Global Compact was launched in 2000 on the initiative of Kofi Annan.⁴⁵⁶ The Global Compact has ten principles divided into four categories: human rights, labor rights, environment, and anti-corruption.⁴⁵⁷ Companies are invited to support, respect, and promote these internationally recognized human rights. According to its proponents, this voluntary initiative encourages business leaders to embrace and enact a set of core values.⁴⁵⁸

The Global Compact is a universal initiative for corporate social responsibility, and includes more than 7700 companies from 130 countries.⁴⁵⁹ Its main interest lies in the establishment of uniform standards⁴⁶⁰ such as Principle 2, which specifically contemplates the idea of corporate complicity and invites companies to ensure that their own entities are not complicit in human rights violations. The commentary to this principle states that a company's complicity in

⁴⁵² Amnesty International, *The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation*, *supra* note 446.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ United Nations Global Compact, *supra* note 435.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ L Van den Herik and J. L. Cernic, 'Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again', 8 (3) *Journal of International Criminal Justice* (2010) 725-743, at 728.

human rights violations can take three main forms: direct, beneficial, and silent.⁴⁶¹ The Covenant also introduces the concept of “sphere of influence,” which is widely regarded as too broad and ambiguous.⁴⁶² This refers to suppliers, service providers, and subcontractors with whom companies are likely to work and to whom they are encouraged to promote respect for human rights.⁴⁶³

Its contributions notwithstanding, the Global Compact has been the subject of much criticism. The Compact has no real legal value: members have no obligation to respect the content of the Global Compact and need only make a report of their activities.⁴⁶⁴ Furthermore, the Compact’s UN “label” can be confusing for public scrutiny, misleading even, when companies use their membership in the Compact for publicity without fulfilling the Compact’s requirements.⁴⁶⁵

Despite the fact that the Global Compact is widely criticized by human rights activists, it should be considered a potentially important soft law development. While the Global Compact can hardly be regarded as much more than a declaration of promises to behave well, it may, in the best-case scenario, contribute to creating a culture of protection of human rights.⁴⁶⁶

⁴⁶¹ “Direct complicity — when a company provides goods or services that it knows will be used to carry out the abuse. Beneficial complicity — when a company benefits from human rights abuses even if it did not positively assist or cause them. Silent complicity — when the company is silent or inactive in the face of systematic or continuous human rights abuse.” Silent complicity is the most controversial type of complicity and is least likely to result in legal liability. in UN Global Compact, *supra* note 435, Ten Principles, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>.

⁴⁶² J. Ruggie, *Clarifying the Concepts of “Sphere of influence” and “Complicity”*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Human Rights Council, (May 14, 2008), available at <http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf>. See also UN Global Compact, Ten Principles, *Ibid*.

⁴⁶³ Conseil de l’Europe, Assemblée parlementaire, *Droits de l’homme et entreprises*, Doc. 12361 (September 27, 2010), Rapport de la Commission des questions juridiques et des droits de l’homme; at 14.

⁴⁶⁴ UN Global Compact, *supra* note 435.

⁴⁶⁵ O. Maurel, *La responsabilité des entreprises en matière de droits de l’homme*, (Paris: Commission nationale consultative des droits de l’homme, 2009), at 166.

⁴⁶⁶ See for instance: Global Policy Forum Europe (ed), *Whose Partnership for whose Development? – Corporate Accountability in the UN System beyond the Global Compact*, 4 July 4, 2007, available at <https://www.globalpolicy.org/images/pdfs/0801whosepartnership.pdf>. See also A. Zammit, *Development at Risk: Rethinking UN-Business Partnerships*, (Geneva: South Centre, 2003).

5.2.3 UN “Protect, Respect and Remedy” framework

Unlike the Guidelines and the Global Compact, the “Protect, Respect and Remedy” framework is an analytical guideline, rather than a voluntary self-regulation mechanism. The United Nations Council of Human Rights approved the framework in 2011, at the end of the second term of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The framework built on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the 2003 Norms), which the General Assembly had rejected in 2003.⁴⁶⁷

The Framework is based on three pillars:

- 1) the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- 2) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur;
- 3) and greater access by victims to effective remedy, both judicial and non-judicial.⁴⁶⁸

Unlike the 2003 Norms, the Framework explicitly articulates the idea that “while corporations may be considered ‘organs of society,’ they are specialized economic organs, not democratic public interest institutions.”⁴⁶⁹ As such, their responsibilities cannot and should not simply mirror the duties of States.”⁴⁷⁰ “Thus, even though the same human rights apply, they may entail distinct duties for different duty-holders, such as the state on the one hand and the corporation on the other.”⁴⁷¹

The Framework has the benefit of bringing together at a negotiation table the several actors involved in issues of business and human rights—states, companies, and civil society—and brokering a consensus between them. However, the Framework still needs to be implemented

⁴⁶⁷ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, (2003), UN Doc. E/CN.4/Sub.2/2003/38/Rev.2.

⁴⁶⁸ *Framework: Protect, Respect and Remedy*, *supra* note 436, §2.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*, §53.

⁴⁷¹ L Van den Herik and J. L. Cernic, *supra* note 460, at 738. Observed by S. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal* (2001) 443-545, at 395.

and it lacks of a monitoring mechanism.

The Guiding Principles on Business and Human Rights for the implementation of the Framework were issued at the same time as the Framework.⁴⁷² While these are useful, they do not—and cannot—make up for the largest shortcoming of “Respect, Protect and Remedy”: its non-binding nature.

Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.⁴⁷³

5.2.4 The International Code of Conduct for Security Providers

The main corporate social responsibility instrument aimed at PMSCs is the International Code of Conduct for Security Providers (ICoC). The roots of the ICoC are found in the aftermath of the Abu Ghraib and Fallujah incidents, which were the first highly-publicized instances of PMSC involvement in armed conflict.⁴⁷⁴ The Swiss government responded to these incidents initially with a federal report in 2004.⁴⁷⁵ Following this report, the Swiss Federal Department of Foreign Affairs proposed two ideas for regulation: a document on state obligations and a code of conduct. While the Directorate of International Law favored the

⁴⁷² *Framework: Protect, Respect and Remedy*, *supra* note 436.

⁴⁷³ J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>, § 13; Ruggie announced since the beginning of his mandate: “I do not want to make it sound as though there should not be any kind of international legal instruments. I just do not think that an overarching business and human rights treaty is around the corner, and therefore we have to look to other measures if nothing else as an intermediate step to reduce the risks that they face.” in Joint Committee on Human Right Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector*, House of Commons, (2009), available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>, at 34 (§ 102).

⁴⁷⁴ See for instance: ‘Will Iraq's government dare dispense with the West's private armies?’, *The Economist*, *supra* note 33; C. Lesnes, *supra* note 33; M. Bina, *supra* note 33; H. Carney, *supra* note 33.

⁴⁷⁵ See Swiss Federal Council, *Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaires privées*, available at <http://www.admin.ch/opc/fr/federal-gazette/2006/631.pdf>

former, which ultimately became the Montreux Document, the Directorate of Political Affairs supported the latter.⁴⁷⁶

Following the successful negotiation of the Montreux Document, the work on the code of conduct started.⁴⁷⁷ The preparation process of the code is a model of collaboration between different sectors—a multi-stakeholder process. Actors from states, civil society, and business participated in the negotiation of the content of the code, as well as in the creation of an institution in charge of the monitoring compliance with the code. The DCAF, the Swiss Federal Department of Foreign Affairs, and the Academy of International Humanitarian Law and Human Rights (ADH) in Geneva supported the entire process.⁴⁷⁸ The final version of the ICoC was agreed upon in September 2010, and fifty-eight PMSCs signed it during a ceremony in Geneva in November 2010.⁴⁷⁹ The ICoC also established a multi-stakeholder temporary Steering Committee, which functions as a temporary board for the initiative.⁴⁸⁰ The Steering Committee prepared the Articles of Association, adopted in February 2013.⁴⁸¹

The content of the ICoC reflects the difficult compromise between the companies' demand that the initiative be market-oriented and the need for it to contain both IHRL and IHL norms.⁴⁸² The companies impacted the content even further, in that the ICoC is more focused on IHRL than IHL. This outcome—no norms regulating combat activities but numerous standards for police services, for example—was a function of the common scope of the companies' business.⁴⁸³

⁴⁷⁶ Interview with Anne-Marie Buzatu, Deputy Head, Operations IV (Public-Private Partnerships) Geneva Center for the Democratic Control of Armed Forces, Geneva, September 2013.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ The ICRC, which supports the Montreux Document, did not support the International Code of Conduct. However, an ICRC legal adviser of the participated in the negotiation of the content of the code in a personal capacity.

⁴⁷⁹ More than 700 companies have signed the code as of 2014. For more information see <http://www.icoc-psp.org/>.

⁴⁸⁰ ICoC, *supra* note 438, §§ 9 and 11.

⁴⁸¹ International Code of Conduct For Private Security Providers' Association, Articles of Association, available at http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf [hereinafter Articles of Association].

⁴⁸² N. Rosemann, *Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies*, Occasional Paper No 15, Geneva Center For the Democratic Control of Armed Forces (2008) at 9.

⁴⁸³ A. Clapham, quoted in S. Bussard, 'La Suisse s'entend avec l'industrie pour régler l'action des mercenaires privés', *Le temps* (November 11, 2010).

The seventy articles that comprise the ICoC touch on a wide range of obligations and principles those companies must meet. The list of human rights is fairly comprehensive and includes, for example, prohibitions on torture,⁴⁸⁴ discrimination,⁴⁸⁵ human trafficking,⁴⁸⁶ and other cruel, inhuman or degrading treatment.⁴⁸⁷ Generally, signatory companies must treat “all persons humanely and with respect for their dignity and privacy.”⁴⁸⁸

Finally, one of the ICoC’s main strengths is that it provides for the creation of an independent institution to monitor its own implementation. This institution is called the International Code of Conduct Association (hereinafter the ICoC Association), and it was launched at a conference that took place in September 2013 in Geneva.⁴⁸⁹

The ICoC Association has a three-pillared structure, with representation of governments, the private security services industry, and civil society. The governments must have also endorsed the Montreux Document to be affiliated with the ICoC Association.⁴⁹⁰ Representatives of civil society need to demonstrate their independence and an institutional record of promoting human rights, IHL, or the rule of law.⁴⁹¹

The structure’s equilibrium is a key element for the functioning of the ICoC Association. All decisions that require the approval of the ICoC Association’s General Assembly require a majority vote in each of the three stakeholder pillars.⁴⁹² A modification or amendment to the ICoC requires a vote of not less than two-thirds of the members present and eligible to vote in each of the three stakeholder pillars.⁴⁹³

The companies’ members of the ICoC Association are subject to certification. They are obliged to show that their “systems and policies meet the Code’s principles and the standards

⁴⁸⁴ ICoC, *supra* note 438, § 35.

⁴⁸⁵ *Ibid.*, § 42.

⁴⁸⁶ *Ibid.*, § 39.

⁴⁸⁷ *Ibid.*, §§ 35-37.

⁴⁸⁸ *Ibid.*, § 28.

⁴⁸⁹ Articles of Association, *supra* note 481.

⁴⁹⁰ *Ibid.*, Art. 3.3.2.

⁴⁹¹ *Ibid.*, Art. 3.3.3.

⁴⁹² *Ibid.*, Art. 6.5.

⁴⁹³ *Ibid.*, Art. 6.5.

derived from the Code and that [they are] undergoing monitoring, auditing, and verification, including in the field.”⁴⁹⁴

The reason that this monitoring mechanism holds such promise is that codes of conduct, as soft law instruments, have no legal value. As such, companies have, independently and voluntarily, promulgated codes of conduct and used them for advertising purposes, rather than genuinely undertaking to comply with them.⁴⁹⁵ The company Chiquita, for example, developed a code of conduct that included a high standard of respect for human values after a number of changes in its management in 1997 and 1998, and a code of conduct was created in 2000.⁴⁹⁶

An internal audit was conducted in 2000 in all divisions in Latin America.⁴⁹⁷ The company published a report in 2001 illustrating progress relating to corporate responsibility and offering a very open and transparent vision of the state of affairs.⁴⁹⁸ Nevertheless, several years later, in 2007, Chiquita plead guilty to providing \$1.7 million of funding to a Colombian paramilitary group, *Autodefensas Unidas de Colombia* (AUC, United Self-Defense Forces of Colombia), between 1997 and 2004.⁴⁹⁹ The AUC was considered a terrorist group by the US government.⁵⁰⁰ As part of this guilty plea, Chiquita agreed to pay \$25 million in fines to the US government.⁵⁰¹ The activities of the AUC were widely known, and there is no doubt that

⁴⁹⁴ *Ibid.*, Art. 11.1.

⁴⁹⁵ See for instance H. Keller, *Corporate Codes of Conduct and their Implementation: The Question of Legitimacy*, (2006), available at www.yale.edu/macmillan/Heken_Keller_Paper.pdf, at 13.

⁴⁹⁶ M. Verre, ‘Implementing Corporate Responsibility – The Chiquita Case’, 44 *Journal of Business Ethics* (2003) 247–260, at 255. “The Code of Conduct translates Chiquita’s Core Values into everyday behaviours. In May 2000, after months of development and review, Chiquita expanded its existing Code of Conduct to include social responsibilities. The labour standards portion of the Code of Conduct is based on the SA8000 standard. The Code of Conduct now embodies standards in the areas of food safety, labour standards, employee health and safety, community involvement, environmental protection, ethical behaviour, and legal compliance.”

⁴⁹⁷ *Ibid.*, at 257.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Department of Justice: Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay \$25 Million Fine, available at http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html.

⁵⁰⁰ The AUC has been listed as a terrorist group by the US Department of State since 2001. See US Department of State, Bureau of Counterterrorism, Foreign Terrorist Organization, available at <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

⁵⁰¹ Department of Justice: Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay \$25 Million Fine, available at http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html. See also “Sensación de impunidad en caso de Chiquita por financiar a paramilitares a pesar de la multa de 25 millones de dólares”, *Semana*, Bogotá, September

they were not in line with the values contained in Chiquita's Code of Conduct, which was developed during its years of collaboration with the Colombian paramilitaries.⁵⁰²

An independent monitoring system is one element that is key to the efficient implementation of a code of conduct.⁵⁰³ The hope is that the ICoC Association will ensure that a company faces sanctions in the event it violates the Code.⁵⁰⁴ For instance, the Board of the ICoC Association has the authority to initiate a suspension:

if the Board determines that corrective action is required to remedy non-compliance with the Code, the Board shall request a Member company take corrective action within a specific time period. Should a Member company fail to take reasonable corrective action within the period specified by the Board, or fail to act in good faith in accordance with these Articles, then the Board shall initiate suspension proceedings in accordance with these Articles.⁵⁰⁵

This monitoring mechanism has the capacity to penalize companies that do not respect the Code, which, as discussed above, includes a significant list of human rights. Thus, if states require companies to sign the ICoC and be members of the ICoC Association in order to work for them, in their territory, or from their territory, the result would be the imposition of human rights on PMSCs. States can require respect for the Code both in the contract they sign with companies and in domestic law; for instance, the British government announced it would include the Code in its contracts and the Swiss Parliament passed a domestic law which requires PMSCs that provide security abroad to sign the ICoC.⁵⁰⁶

If states, in their domestic law, were to require membership in the ICoC Association and provide that the sanction for a grave violation of the Code would be the company's exclusion

17, 2007. See further a follow-up of the case, S. Cohen, 'How Chiquita Bananas Undermined The Global War On Terror', *Thinkprogress* (August 2, 2014).

⁵⁰² See, for instance, Human Right Watch, *Colombia The Ties That Bind: Colombia and Military-Paramilitary Links*, February 2000, available at <http://www.hrw.org/reports/2000/colombia/>.

⁵⁰³ N. Rosemann, *Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies*, *supra* note 482, at 34.

⁵⁰⁴ Articles of Association, *supra* note 481.

⁵⁰⁵ *Ibid.*, Art. 12.2.7

⁵⁰⁶ Loi fédérale sur les prestations de sécurité privées fournies à l'étranger, Art. 7, September 27, 2013, available at <http://www.admin.ch/opc/fr/federal-gazette/2013/6577.pdf>; see the draft of the law (in English) Federal Act (Draft) on Private Security Services Provided Abroad, proposed in January 2013, available at <http://www.ejpd.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/entw-e.pdf>. See also, 'Armée privée: Le National interdit les mercenaires mais allège la loi', *Tribune de Genève* (September 10, 2013) available at <http://www.tdg.ch/suisse/Le-National-interdit-les-mercenaires-mais-allege-la-loi/story/22417589>.

from the ICoC Association, a company that violates the Code would see its ability to obtain new contracts seriously compromised. This could be an effective sanction for violations of human rights by companies.

The ICoC's innovations notwithstanding, there are various problems with it. First and foremost, as mentioned above, the impact of codes of conduct on business practice is relatively limited, due in part to the extremely low possibility of direct use of the instrument in court proceedings. Jurisprudence is not highly developed in this area, and the existing jurisprudence does not tend to support a real recognition of codes of conduct;⁵⁰⁷ for example, the Social Chamber of the French Court of Cassation rejected the argument of a company that the existence of a code of conduct had consequences for a labor contract.⁵⁰⁸ In this case, which related to the payment of severance benefits by a company to one of its employees, the Court stated that a code of conduct had no legal value.⁵⁰⁹ However, "if codes of conduct seem unsuitable and ill-adapted to ensure the functions generally entrusted to formal sources of law, their development and influence are now too clear to be ignored or maligned by positive law."⁵¹⁰ Recognition of the ICoC by regional or international institutions would give it additional institutional support and have a positive effect on its application.⁵¹¹

In addition to concerns about its soft law status and ultimate value, there are some more substantive issues with the content of the Code. The ICoC applies to all situations that are defined as complex environments, that is:

any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.⁵¹²

⁵⁰⁷ B. Frydman and G. Lewkowicz, *supra* note 429, at 14.

⁵⁰⁸ Court de Cassation, Chambre Sociale (June 6, 2001), No 99-43.929.

⁵⁰⁹ *Ibid.*

⁵¹⁰ B. Frydman and G. Lewkowicz, *supra* note 429, at 14. Author's translation.

⁵¹¹ N. Rosemann, *Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies*, *supra* note 482, at 40. See for example the references made by European Union and the Security Council of the Kimberley process.

⁵¹² ICoC, *supra* note 438, definitions, at 5.

Some argue that the ICoC is narrow in application in that it does not apply on the high seas.⁵¹³ However, the definition uses the word “area” and⁵¹⁴ “[i]t includes any ‘areas’ as opposed to ‘territories,’ which suggests that the Code should apply to the provision of security services on the high seas.”⁵¹⁵

The use of force is another issue with the ICoC. Articles 29, 30, 31, and 32 address the use of force. The Code states that PMSC personnel must take “all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law.”⁵¹⁶ The Code continues, stating that PMSC personnel will “not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life.”⁵¹⁷ In the event that PMSCs are working in an armed conflict in which IHL applies, the use of force is regulated by the rules of engagement, not the ICoC.⁵¹⁸ It is also worth noting that, in an armed conflict, *any* civilian taking part in hostilities in *any* way loses his/her protection and becomes a legitimate target—in IHL there is no difference between offensive and defensive participation in hostilities.⁵¹⁹

⁵¹³ Due to an increase in international piracy, PMSCs have been hired to protect vessels. On the topic see N. Ronzitti, ‘The Use of Private Contractors in the Fight against Piracy: Policy Option’ in F. Fancioni and N. Ronzitti, *supra* note 1. “The high seas are not under the authority of any state, yet the definition of a complex environment assumes the locus of activity to be within the territory of a sovereign country” in I. M. Ralby, ‘Maritime Security and the ICoC’, 7 *Journal of International Peace Operations*, (November-December 2011).

⁵¹⁴ ICoC, *supra* note 438, definitions, at 5.

⁵¹⁵ Geneva Academy of International Humanitarian Law and Human Rights, *The International Code of Conduct for Private Security Service Providers*, Academy Briefing N°4, available at http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf.

⁵¹⁶ ICoC, *supra* note 438, § 30.

⁵¹⁷ *Ibid.*, § 31.

⁵¹⁸ See for instance A. Bellal and S. Casey-Masle, *Rules of Engagement, Protecting Civilians through Dialogue with Armed Non-State Actors*, Geneva Academy of International Humanitarian Law and Human Rights, October 2011, available at <http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules-of-Engagement-EN.pdf>.

⁵¹⁹ “The notion direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.” In Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, May 2009, at 70. Hostilities should be understood as “offensive or defensive acts and military operations” in an armed conflict. J. Quéguiner *supra* note 357. See also M. Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law*, Background Paper prepared for the Informal High Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003, at 9, available at <http://www.hpcresearch.org/publications/applied-research/hpcr-research-and-working-papers>.

On a related note, Article 32 addresses situations in which PMSC personnel are “formally authorized”—which should be understood as authorized by a state—to work in law enforcement or security operations.⁵²⁰ However, when PMSCs are involved in these types of operations, they are, almost by definition, working in areas where the state capacity is deficient or lacking; thus, “it is not clear how such formal authorization may be given where, for example, a host state’s capacity is deemed to be non-existent.”⁵²¹ In these cases, the concern is that PMSCs’ employees will make decisions about the use of force without being authorized to use force.

Finally, the monitoring process is probably one of the ICoC’s biggest challenges. PMSCs are private companies that work and operate in small cells, often in areas that are difficult to access. Effective control in a complex environment poses serious logistical problems. Monitoring PMSCs’ activities and respect for IHL in a situation of armed conflict, where PMSCs’ employees are sometimes allowed to use force, is even more complex.

Thus, there are several hurdles for the complete implementation of the ICoC. Nevertheless, if some of these challenges can be overcome, the ICoC, complemented by an active role for the states, has the potential to impose human rights obligations and responsibility on PMSCs. For now, it is too early to evaluate the impact of the ICoC and its Association, but the ICoC is more than a simple self-regulatory mechanism. State intervention to enforce the ICoC would be a step more to crystallize the emerging norm of corporate responsibility for human rights violations.

⁵²⁰ ICoC, *supra* note 438, § 32.

⁵²¹ Geneva Academy of International Humanitarian Law and Human Rights, *The International Code of Conduct for Private Security Service Providers*, *supra* note 515, at 36.

Part 2: Latin American perspective

International initiatives for regulating PMSCs are often difficult to implement, and it is challenging to discern the concrete effects on the ground of these initiatives. In a world of sovereign states, multilateral commitments are only effective when given concrete expression in national legislation and institutions. Thus, the current base of implementation is invariably rooted at the national level.

However, existing regional mechanisms or institutions—the Inter-American System of Human Rights, the European System of Human Rights, the African System of Human and Peoples’ Rights, and the Arab System of Human Rights for example—may improve the implementation of international initiatives at the national level. The regional approach is particularly relevant when addressing a new phenomenon that is highly adaptable to different contexts and, thus, needs a more specific approach than a global one. Private security has been a growth industry in Latin America, providing a wide range of services to various types of clients, while evolving rapidly in response to changes in the legal and regulatory environments.

Regional-level mechanisms represent a promising intermediate ground between the international and national levels because they retain the international component, which is necessary for responding to transnational challenges such as the privatization of security, but take into account a sort of “cultural” approach.⁵²² “Favorable conditions within a region may lead states to trust their neighbors more, and to be more willing to empower regional bodies to adjudicate human rights disputes—finding facts, evaluating them against the governing legal standard, and ordering appropriate remedies—in comparison with more distant global institutions.”⁵²³

⁵²² For the definition of “cultural” and “regional” approach see *supra* note 26.

⁵²³ G. L. Neuman, *supra* note 26, at 106.

Chapter 6: (Why) the Inter-American System of Human Rights

The Inter-American System of Human Rights has been a key actor in social and political development in Latin America and the Caribbean: “it is possible to argue that the System has done more for strengthening democracy, the rule of law, and respect for human rights in the Americas than any other inter-governmental institution.”⁵²⁴ Indeed, since its creation the System’s main focus has been to defend the vulnerable against the abuse of power, as it had to adapt to face the reality of a region marked by totalitarianism and massive violations of human rights. As states were not the only actors implicated in human rights violations, the System has also developed jurisprudence addressing responsibility for private actors’ activities.

6.1 Historical objective to protect the vulnerable

“The Inter-American Court places the human being at the very center of Inter-American law,”⁵²⁵ and the importance of the “human being” in the Inter-American System is the fundamental reason it has a role to play in the regulation of PMSCs at the regional level. The System was created in a context of persistent intervention of the US in the region; as a result, it was surrounded, in its early years of existence, by dictatorships perpetrating human rights violations on a massive scale. The result is a system centered on defending more vulnerable populations—those who need stronger protections, such as children, women, indigenous peoples, and persons with disabilities—against abuses of power. Although PMSCs do not reach the levels of human rights violations that characterize the region’s past, they represent a new threat to the vulnerable. Providing security for the rich against the poor and for extractive industries against indigenous peoples, allowing a discreet US intervention in Latin America and attacks on women with impunity, PMSCs highlight the salience of the historical purposes of the Inter-American System of Human Rights.

⁵²⁴ S. A. Canton, ‘To Strengthen Human Rights, Change the OAS (Not the Commission)’, 20 (2) *Human Rights Brief* (2013), 5-12 available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1836&context=hrbrief>.

⁵²⁵ L. Hennebel, ‘The Inter-American Court of Human Rights: The Ambassador of Universalism’, *Quebec journal of International Law*, (2011), at 60.

6.1.1 Nascent regional system addressing persistent US interventionism

The process of regional integration in Latin America started with Simón Bolívar's attempt to create an association of states in the hemisphere during the Congress of Panama in 1826.⁵²⁶ Later, the International Union of American Republics for the prompt collection and distribution of commercial information—the predecessor of the Organization of American States (OAS)—was established in 1890 during the First International Conference of American States held in Washington, DC.⁵²⁷

During this period, countries in the region expressed their commitment to the protection of human rights on several occasions.⁵²⁸ For instance, in 1945, during the Inter-American Conference on Problems of War and Peace, commonly referred to as the Chapultepec Conference, states began to draft a program for the protection of human rights.⁵²⁹ At the same time, however, the United States' persistent intervention in the domestic affairs of countries in the region during “the early part of the twentieth century stimulated Latin American efforts to

⁵²⁶ An US Administrative History Note explain: “The Congress of Panama, proposed by a circular letter of December 7, 1824, from Simon Bolivar, met at Panama from June 22 to July 15, 1826. Its announced purpose was to consider and adopt a plan for the defense of the Americas from foreign aggression. The agenda of the conference was dividied [sic] into matters concering [sic] belligerents and matters between belligerents and neutrals. [...] The Congress failed to produce any tangible results.” National Archives, Panama Congress (June 22, 1826 – July 15, 1826), available at <http://research.archives.gov/organization/1142861>.

⁵²⁷ The Conference was held “for the purpose of discussing and recommending for adoption to their respective Governments some plan of arbitration for the settlement of disagreements and disputes that may hereafter arise between them, and for considering questions relating to the improvement of business intercourse and means of direct communication between said countries, and to encourage such reciprocal commercial relations as will be beneficial to all and secure more extensive markets for the products of each of said countries.” OAS, ‘*About the OAS, Our History*’, available at http://www.oas.org/en/about/our_history.asp; Charter of the Organization of American States, (adopted April 30, 1948; entered into force 13 Dec. 1951) [hereinafter Charter of the OAS].

⁵²⁸ For instance: the Third Pan American Conference of 1906 approved the Convention Establishing the Status of Naturalized Citizens who Again Take up Their Residence in the Country of Their Origin; The Sixth International Conference of American States approved the Convention on the Status of Aliens and the Convention on the Right to Asylum, in 1928.

⁵²⁹ R. K. Goldman, ‘History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights’, 31 *Human Rights Quarterly* (2009), at 857. See for instance: Resolution XL, in Report of the Delegation of the United States of America to the Inter- American Conference on Problems of War and Peace 108 (1946) which states: “International protection of essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man.”

establish a regional public order system based on the principles of non-intervention and the sovereign equality of states.”⁵³⁰ Actually:

The apparent readiness to overlook the inherent contradiction between the international protection of human rights and the regional doctrine of non-intervention has been a familiar and notable characteristic of Inter-American conferences and of the work product of regional juridical bodies. When the contradiction was perceived at all, it was some time resolved in favor of the doctrine of non-intervention.⁵³¹

Ultimately, the authoritative principle of “non-intervention” was consecrated in the Charter of the OAS, which was created at the Ninth International Conference of American States held in Bogota in 1948.⁵³² Articles 19 and 21 of the Charter state:

Art. 19: No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against its political, economic, and cultural elements.

Art. 21: The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.⁵³³

The OAS Charter focuses on five areas:

- 1) democracy, specifically by strengthening freedom of speech, encouraging an increase in the participation of civil society in government
- 2) human rights, especially the areas of women's rights, children's rights, and cultural rights
- 3) regional and hemispheric peace and security by eliminating terrorism and de-mining the area
- 4) rule of law by strengthening the Inter-American legal development, ridding the region of illegal drug use and trafficking, and lowering regional crime levels
- 5) regional economy⁵³⁴

⁵³⁰ R. K. Goldman, *supra* note 529, at 857. The US has intervened in a way or another (but often militarily) in the majority of the Latin American countries during the twentieth century. On US interventionism in Latin America, see for instance G. Grandin, *Empire's Workshop: Latin America, the United States, and the Rise of the New Imperialism*, (New York: Holt Paperbacks, 2006).

⁵³¹ J. Cabranes, ‘The Protection of Human Rights by the Organization of American States’, 62 *American Journal of International Law* (1968) 889-908, at 892-93.

⁵³² OAS, ‘*About the OAS, Our History*’, *supra* note 527

⁵³³ Charter of the OAS, *supra* note 527.

⁵³⁴ *Ibid.*

The OAS Charter created a new regional organization—the OAS—based on the idea that “the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.”⁵³⁵ The explicit link between human rights and democracy was a significant innovation from the universal system at that time.⁵³⁶

At the same conference where the OAS was created, the twenty-one participating states signed the American Declaration of the Rights and Duties of Man (hereinafter the American Declaration or the Declaration).⁵³⁷ The Declaration is a normative soft law instrument that enshrines a set of basic civil, political, economic, and social rights, as well as proclaims the duties of each individual.⁵³⁸ “The civil and political rights largely restate those already guaranteed in the constitutions of most American states”;⁵³⁹ the economic and social rights included in the Declaration, such as the right to the preservation of health and to well being,⁵⁴⁰ to the benefits of culture,⁵⁴¹ to work, and to a fair remuneration for work, were not common in Latin America.⁵⁴²

Nevertheless, “despite their noble statement, the American states chose not to make the American Declaration binding on its signatories, nor did they create any machinery to promote, much less protect, the rights they had just proclaimed.”⁵⁴³ A stronger instrument was created later, this time not to address US interventionism but the atrocities committed by authoritarian regimes.

⁵³⁵ *Ibid.*

⁵³⁶ T. M. Franck, ‘The emerging right to democratic governance’, 86 (1) *American Journal of International Law* (1992), 46-91.

⁵³⁷ American Declaration on the Rights and Duties of Man, OAS (May 2, 1948), Res. XXX, Doc. OEA/Ser.L.V/II.82 [hereinafter American Declaration].

⁵³⁸ See for instance: the duty to receive instruction; to vote; to obey the law; to serve the community and the nation; to work; and to pay taxes, in American Declaration, *Ibid.*

⁵³⁹ R. K. Goldman, *supra* note 529, at 860.

⁵⁴⁰ American Declaration, *supra* note 537, Art. XI.

⁵⁴¹ *Ibid.*, Art. XIII.

⁵⁴² *Ibid.*, Art. XIV.

⁵⁴³ R. K. Goldman, *supra* note 529, at 860.

6.1.2 Creating a regional system for the protection of human rights in a dictatorship context

The development of the Inter-American System has occurred in a completely different context from its European counterpart. While the states that drafted the European Convention were liberal democracies with strong and independent judiciaries, military and other authoritarian governments were almost the norm in Latin America from the mid-twentieth century until the early 1980s.

The European Commission and Court have rarely had to deal with completely unresponsive or even antagonistic governments or national legal systems, or with deep structural problems that led to systematic and serious human rights violations. [...] By contrast, states of emergency have been common in Latin America, the domestic judiciary has often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon. Many of the governments with which the Inter-American Commission and Court have had to work have been ambivalent towards those institutions at best and hostile at worst.⁵⁴⁴

The Latin American context until the 1980s was marked by systematic murder, torture, disappearances, censorship of the media, and limitations on political rights. For example, Argentine dictator Jorge Rafael Videla (1976-1983) was responsible for at least 15,000 disappearances (30,000 according to humanitarian organizations).⁵⁴⁵ Chilean dictator Augusto Pinochet (1973-1990) was responsible for more than 40,000 victims.⁵⁴⁶ In Guatemala, the armed conflict resulted in more than 200,000 extrajudicial executions and forced disappearances between 1962 and 1996.⁵⁴⁷ The list continues, including Hugo Banzer in Bolivia (1971-1978),⁵⁴⁸ several Brazilian military leaders (1964-1969),⁵⁴⁹ Paraguay's Alfredo

⁵⁴⁴ H. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (2nd edn. New York: Oxford University Press, 2000) at 869.

⁵⁴⁵ See for instance: M. Seoane and V. Muleiro, *El Dictador: La Historia Secretay Pública de Jorge Videla* (4^e edn. Buenos Aires: Sudamericana, 2001). See also *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (1983) available at http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm.

⁵⁴⁶ As of 2011 the Chilean state recognized 40,018 victims. In BBC news, Chile recognises 9,800 more victims of Pinochet's rule, August 18, 2011, available at <http://www.bbc.co.uk/news/world-latin-america-1458409>. See also R. Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2002).

⁵⁴⁷ See *Case of Tiú-Tojín v. Guatemala*, IACtHR (November 26, 2008) Series C No. 190, §§ 48–51.

⁵⁴⁸ R. J. Alexander, *Bolivia, Past, Present and Future of its Politics* (New York: Praeger, 1982). See also *Case of Ticona- Estada et al. v. Bolivia*, IACtHR (November 27, 2008) Series C No. 191, §§ 45–49.

Stroessner,⁵⁵⁰ and Juan María Bordaberry of Uruguay (1973–1976).⁵⁵¹ Several of these dictators worked together to implement terror in an “alliance of security forces and intelligence services.”⁵⁵² The creation first of the Inter-American Commission, then of the Inter-American Court, and both institutions’ further political role in the region, must be understood in this context.

In 1960, after the Dominican Republic’s dictator, Rafael Trujillo, attempted to have Venezuela’s president assassinated, countries from the Latin American and Caribbean convened the Sixth Meeting of Consultation of Ministers of Foreign Affairs of American States.⁵⁵³ There they started to shape a regional program for the protection of human rights.

The alleged external terrorist activities of the Trujillo regime began to turn the O.A.S. toward the view that violations of human rights and denials of democratic freedoms within member states might affect the peace of the Americas and might thus become a proper concern of the Organization. It is important to stress, however, that it was the Dominican regime’s alleged violation of the non-intervention doctrine itself that first prompted the O.A.S. to examine its role in promoting respect for human rights.⁵⁵⁴

Following this conference, the OAS approved the statute of the Inter-American Commission on Human Rights (hereinafter IAComHR or the Commission) as “an autonomous entity.”⁵⁵⁵ Article 9 of the statute defines its function:

- (a) To develop an awareness of human rights among the peoples of America;
- (b) To make recommendations to the governments of the member states general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;

⁵⁴⁹ Such as Humberto Castello Branco and Arthur da Costa e Silva. See T. E. Skidmore, *The Politics of Military Rule in Brazil 1964-85* (New York: Oxford University Press, 1988).

⁵⁵⁰ See H. J. Wiarda and H. F. Kline, *A Concise Introduction to Latin American Politics and Development* (2nd edn., Boulder: Westview Press, 2007), at 80 and 138.

⁵⁵¹ See C. Demasi et al., *La Dictadura Cívico -Military Uruguay 1973-1985* (3rd edn., Montevideo: Ediciones de la Banda Oriental, 2013); See also A. Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997).

⁵⁵² *Case of Almonacid-Arellano et al. v. Chile*, IACtHR (September 26, 2006), Preliminary Objections, Merits, Reparations and Costs, Series C No. 154, § 64.

⁵⁵³ J. Cabranes, ‘Human Rights and Non-Intervention in the Inter-American System’, 65 *Michigan Law Review* (1967) 1147-1182, at 1164.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Inter-American Commission on Human Rights, Statute, adopted May 25, 1960, OAS Doc. OEA/Ser.L/V/I.1 (1960); modified in October 1979. [hereinafter IAComHR Statute]

- (c) To prepare such studies or reports as it considers advisable in the performance of its duties;
- (d) To urge the governments of the member states to supply it with information on the measures of human rights;
- (e) To serve the O.A.S. as an advisory body in respect of human rights.⁵⁵⁶

In other words, the function of the Commission is to “promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”⁵⁵⁷ The IAComHR’s seven independent members serve in a personal capacity and carry out the Commission’s functions in Washington, DC.⁵⁵⁸

Over the years, the Commission has at times interpreted its functions liberally. For instance, the Commission does not have the explicit authority to carry out site visits, but it has interpreted the authorization to hold meetings in any state in the hemisphere⁵⁵⁹ “[as] a mandate to conduct monitoring and the preparation of a report on the human rights situation in the country visited.”⁵⁶⁰ These reports have been a key aspect of the work of the Commission: they “dominated the agenda of the OAS General Assemblies for many years, especially during the long period of military dictatorships in the region, when the Inter-American Commission critically reviewed the behavior of these states as regards their failure to respect human rights norms.”⁵⁶¹

Another feature of the Commission that helps it fulfill its mandate is the individual complaint mechanism. The individual complaint mechanism empowers any individual to present a petition to the Commission, alleging the violation of a right contained in either the American Convention on Human Rights or the American Declaration.⁵⁶² The condition for the Commission to consider the petition is that the alleged victim(s) must have exhausted domestic remedies at the national level—the rationale for this requirement is that “[t]he

⁵⁵⁶ *Ibid.*, Art. 9.

⁵⁵⁷ Inter-American Commission of Human Rights, Mandate, available at <http://www.oas.org/en/iachr/mandate/what.asp>.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ IAComHR Statute, *supra* note 555, Art. 9.

⁵⁶⁰ C. M. Cerna, ‘The Inter-American System for the Protection of Human Rights’ 16 *Florida Journal of International Law* (2004), at 199.

⁵⁶¹ *Ibid.*

⁵⁶² ACHR, Art. 44; American Declaration, *supra* note 537, Art. XXIV.

international system plays a subsidiary role and is triggered by the failure of national law to function properly.”⁵⁶³

The member states of the OAS finally adopted the American Convention on Human Rights in November 1969, during the Inter-American Specialized Conference on Human Rights.⁵⁶⁴ The Convention entered into force on July 18, 1978 after ratification by eleven states.⁵⁶⁵ At that moment, the American Convention supplanted the American Declaration to become the primary source of human rights obligations in the region; however, the American Declaration was consecrated in Article 29 ¶ 4 of the American Convention as a source of interpretative guidance for the rights laid down in the Convention, and it also remains the source of human rights obligations for states that did not ratify the Convention.⁵⁶⁶

The ACHR codifies traditional civil and political rights.⁵⁶⁷ It protects the rights and liberty of the “person”—defined in Article 2(2) as a human being, excluding legal entities.⁵⁶⁸ The Convention is centered exclusively on the individual because of its conception of what human rights are and the necessity of defending humans against abuses of power.⁵⁶⁹ The other fundamental concept is that human rights are protected and ensured by way of “state obligations,” rather than by obligations of private actors.⁵⁷⁰ For certain observers, the far reach

⁵⁶³ C. M. Cerna, *supra* note 560, at 199.

⁵⁶⁴ Inter-American Specialized Conference on Human Rights: Resolution and Recommendation concerning American Convention on Human Rights, OAS (November 22, 1969). The consideration of the new Draft Convention was postponed the first time because of the Bay of Pigs fiasco, the Inter-American Conference was not held in 1961; and the second time because the General Assembly of the United Nations, on 16 December 1966, approved the International Covenant on Economic, Social, and Cultural Rights, the ICCPR, and an Optional Protocol to the latter covenant and the OAS Committee on Legal and Political Affairs alerted the OAS Council of the possibility of conflict between the worldwide and regional programs aimed to protect human rights. In R. K. Goldman, *supra* note 529, at 864.

⁵⁶⁵ To date, twenty-five American nations have ratified or have adopted the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights, by a communication addressed to the General Secretary of the OAS on May 26, 1998.

⁵⁶⁶ ACHR, Art. 29.

⁵⁶⁷ F. Lenzerini and F. Francioni, *The Role of Human Rights in the Regulation of Private Military and Security Companies: General Report-Universal and Regional Systems: Latin America, Africa, and Asia*, European University Institute Working Paper (2009), at 24.

⁵⁶⁸ ACHR, Art. 2

⁵⁶⁹ L. Hennebel, *supra* note 525, at 60.

⁵⁷⁰ *Ibid.*

of the Convention “derives both its strengths and weaknesses.”⁵⁷¹ The Convention guarantees many rights, which were (and still are) largely ignored by many countries in the region and “essentially prescribed maximum, not minimum, human rights.”⁵⁷²

In order to enforce and interpret the provisions contained therein, the Convention creates the Inter-American Court of Human Rights and defines its functions and procedures.⁵⁷³ During the sixth special session of the OAS General Assembly in November 1978, the states parties to the ACHR decide to move the Court from Washington, DC to Costa Rica.⁵⁷⁴ The settling ceremony of the Court was celebrated in San Jose on September 3, 1979.⁵⁷⁵ The Government of Costa Rica and the Court signed Headquarters Agreement approved by the Law No. 6889 of September 9, 1983.⁵⁷⁶ This agreement sets privileges and immunities of the Court and its staff.⁵⁷⁷

The Court is composed of seven judges elected by the OAS General Assembly for a six-year term, renewable one time.⁵⁷⁸ The Court has an adjudicatory and advisory function.⁵⁷⁹ It can receive 1) cases submitted by the Commission against states that have accepted the jurisdiction of the court; 2) cases submitted by a state party in response to a decision of the Commission,⁵⁸⁰ or 3) cases submitted by a state party against another state party, invoking a violation of an obligation under the American Convention.⁵⁸¹ The Court also issues advisory opinions on legal issues brought to its attention by OAS bodies or member states.⁵⁸²

⁵⁷¹ R. K. Goldman, *supra* note 529, at 866.

⁵⁷² *Ibid.*

⁵⁷³ IACtHR, Statute, OAS (October 1979), Resolution No.448. [hereinafter IACtHR Statute]

⁵⁷⁴ IACtHR, *I/A Court History*, available at <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh>

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ IACtHR, Statute, *supra* note 573, Chapter II, Art. 5.

⁵⁷⁹ *Ibid.*, Chapter I, Art. 2.

⁵⁸⁰ This has occurred only once, in *Case of Viviana Gallardo* submitted by Costa Rica. The Court dismissed the case, see *Case of Viviana Gallardo (Costa Rica v. Costa Rica)*, IACtHR (November 13, 1981), Series A, Case 101/81.

⁵⁸¹ IACtHR, Statute, *supra* note 573, Chapter I, Art. 2.

⁵⁸² ACHR, Art. 41.

The work of the Commission became politicized because “[h]uman rights advocacy in the 1970s through the late 1980s...became identified by many elites throughout the Americas as a kind of leftist ideology which, in turn, had the unfortunate effect of tainting and politicizing the subject.”⁵⁸³ The work of the IAComHR in this context was often seen as supporting the “internal enemies” of the Latin American governments.⁵⁸⁴

Even so, the Commission increased its credibility and visibility in the region:

it converted itself into an accusatory agency, a kind of “Hemispheric Grand Jury,” storming around Latin America to vacuum up evidence of high crimes and misdemeanors and marshalling it into bills of indictment in the form of country reports for delivery to the political organs of the OAS and the court of public opinion.⁵⁸⁵

As mentioned above, the Commission’s publication of country reports that evaluated the human rights practices of governments throughout the region played an important role during this authoritarian period. The reports on Chile and Argentina are often mentioned for their impact in these countries.⁵⁸⁶ The Commission’s 1980 report on Argentina “chronicled and exposed the systematic nature of the human rights violations being perpetrated by that country’s military government. The report’s publication has been widely credited in Argentina as having helped decrease the number of reported disappearances.”⁵⁸⁷

Most authoritarian regimes throughout the region ended in late 1980s, and around the same time, the IACtHR decided its first case:⁵⁸⁸ the *Case of Velásquez-Rodríguez*. The case and the

⁵⁸³ R. K. Goldman, *supra* note 529, at 872.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ T. Farer, ‘The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox’, 19 *Human Rights Quarterly* (1997) 510-546, at 515.

⁵⁸⁶ Report on the Status of Human Rights in Chile, IAComHR (1974), OEA/ Ser.L/V/II.34. Second Report on the Situation of Human Rights in Chile, IAComHR (1976) OEA/Ser.L/V/II.37. Third Report on the Situation of Human Rights in Chile, IAComHR (1977), OEA/ Ser.L/V/II.40. Report on the Situation of Human Rights in Argentina, IAComHR (1980) OEA/ Ser.L/V/II.49.

⁵⁸⁷ R. K. Goldman, *supra* note 529, at 873.

⁵⁸⁸ The *Case of Velásquez Rodríguez v. Honduras* is the first case the Court accepted. The first case to come to the Court was labeled *Costa Rica v. Costa Rica*. A Costa Rican woman, Viviana Gallardo, had been arrested by the Costa Rican police following a shoot-out in which one policeman was killed. During the time she was in a police station, an off-duty policeman who was a friend of the dead officer killed Gallardo. The President of Costa Rica, who had earlier participated in the Court's inauguration, thought that the ideal solution would be to submit the case to the Court and take advantage of its presence in the country. The Court therefore ruled the case inadmissible stating that there was no exhaustion of domestic remedies. Moreover, “[u]nlike before the Court, individuals have standing in the Commission to present their case on equal footing with the States Parties. To

way in which the Court resolved it contributed to the de-politicization of human rights in the region.⁵⁸⁹ On one hand, the Court framed the case in term of human rights and reinforced the “idea that human rights apply regardless of the political context or the regime in power.”⁵⁹⁰ On the other hand, by “following a judicial process based on a treaty, and issuing an impartial decision grounded in the rule of law, the Court circumvented sovereignty concerns and the politics that generally accompanied human rights discussions in the hemisphere.”⁵⁹¹ Since the *Velásquez-Rodríguez* decision, the political situation in Latin America has changed drastically and the Inter-American System of Human Rights has not only contributed to these changes by protecting human rights and democratic values⁵⁹² but has also been able to adapt to the new situations by fighting against abuses of power, destruction of the rule of law, and impunity.⁵⁹³

6.1.3 Humanization of the law

During the 1990s, the Commission moved from country reports to reports focused on addressing and formulating recommendations on specific human rights practices.⁵⁹⁴ The work of the Commission in Peru during the 1990s and 2000s illustrates this evolution: after obtaining an invitation from the president at the time, Alberto Fujimori, to conduct an on-site visit to Peru in 1998, the Commission prepared a comprehensive report on the human rights situation.⁵⁹⁵ The report was presented during the OAS General Assembly in June 2000 in order to receive greater exposure.⁵⁹⁶ The report focused on the destruction of the rule of law

allow a State to unilaterally waive a right that was designed in part to protect the interests of individuals was, in the Court's view, incompatible with the balance the Convention sought to achieve. The Court therefore ruled the case inadmissible and transferred it to the Commission, but Ms. Gallardo's family refused to pursue the matter there.” In T. Buergenthal, ‘New Upload – Remembering the early years of the Inter-American Court of Human Rights’, 37 *N.Y.U. Journal of International Law and Politics* (2004-2005) at 285.

⁵⁸⁹ C. Grossman, ‘The Inter-American System of Human Rights: Challenges for the Future’, 83 *Indiana Law Journal* (2008) 1267-1282 at 1274.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*, at 1279.

⁵⁹³ *Ibid.*

⁵⁹⁴ See for instance: Access to Justice as a Guarantee to Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, IACoMHR (2007), OEA/Ser.L/V/II.129; Report on the Implementation of Justice and Peace Law: Initial Stages of the Demobilization of the AUC and First Judicial Proceedings, IACoMHR (2007), OEA/Ser.L/V/II.129.

⁵⁹⁵ *Second Report on the Situation of Human Rights in Peru*, IACoMHR (2000) OEA/Ser.L/V/II.106.

⁵⁹⁶ C. Grossman, *supra* note 589.

and democracy during Fujimori's terms and pointed out Fujimori's third election as an interruption of the democratic process.⁵⁹⁷ The political organs of the OAS reacted to the report, requiring the "Fujimori government to take a series of measures that most certainly influenced Fujimori's decision to resign the presidency in disgrace several months after the publication of the report."⁵⁹⁸

During this time, the Court rapidly expanded its jurisprudence affirming its authority in the region. It demonstrated a will to integrate other international jurisprudence and to promote the universalism of human rights, thanks in part to the influence of then-Inter-American Court judge Cançado Trindade, now judge at the ICJ.⁵⁹⁹ For instance, he has argued that Common Article 3 to the Geneva Conventions is part of *jus cogens*.⁶⁰⁰ In that sense, regional courts are encouraged to abandon a traditional legal approach based on a material breach of their constitutive instrument in favor of a focus on the obligation *erga omnes* to protect the human person.⁶⁰¹ Trindade justifies this development explaining that the International Court of Justice has not been able to protect the human person at the international level, thus specialized courts have to assume this role.⁶⁰² In this sense, the multiplication of jurisdictions is positive for access to justice by victims.⁶⁰³

⁵⁹⁷ *Second Report on the Situation of Human Rights in Peru*, *supra* note 595.

⁵⁹⁸ R. K. Goldman, *supra* note 529, at 878.

⁵⁹⁹ Judge Cançado Trindade himself stated: "I feel grateful because the Court has adopted my reasoning, which today is an *acquis*, a conquest of its jurisprudence constante on the matter. Now that my time as Incumbent Judge of this Court expires, a Court which has assumed a vanguard position among the contemporary international courts regarding to this matter in particular, I feel entirely free to point out that this is an advance that admits no stepping back. I insist (considering that very soon, on January 1, 2007, the time to silence in my present office shall come) that this Court cannot let itself stop or regress its own jurisprudence regarding imperative law (*jus cogens*) within this scope of protection of the human being, regarding both substantive and procedural law." In Separate opinion of Judge Cançado Trindade, *Case of La Cantuta v Peru*, IACtHR (November 29, 2006) Series C No 162, § 61. On the influence of Judge Cançado Trindade on the jurisprudence of the Court see E. Hansbury, 'Le juge interaméricain et le "jus cogens"', *eCahiers n° 11* (2011), available at <http://iheid.revues.org/390>, Chapter 3.

⁶⁰⁰ Dissenting opinion of Judge Cançado Trindade, *Case of the Serrano-Cruz Sisters v El Salvador*, IACtHR (March 1, 2005) Series C No 120, § 40. See also Separate opinion of Judge Cançado Trindade, *Case of Las Palmeras v Colombia*, IACtHR (2001), Series C No. 90, §§ 7 et s., Separate opinion of Judge Cançado Trindade, *Case of the Miguel Castro-Castro Prison v Peru*, IACtHR (November 25, 2006) Series C No 160, § 153.

⁶⁰¹ Separate opinion of Judge Cançado Trindade, *Case of Las Palmeras v Colombia*, *ibid.*, §§7-8.

⁶⁰² Dissenting opinion of Judge Cançado Trindade, *Case of the Serrano-Cruz Sisters v El Salvador*, *supra* note 600, § 45.

⁶⁰³ Separate opinion of Judge Cançado Trindade, *Case of Caesar v Trinidad and Tobago*, IACtHR (March 11, 2005) Series C No 123, §§ 44-45.

The American Convention protects the rights and liberties only of persons.⁶⁰⁴ Some other legal instruments—Protocol No. 1 to the European Convention on Human Rights, for example—explicitly recognize the concept of “legal entities” and also provide for those entities’ rights and liberties.”⁶⁰⁵ This is not the case in the Inter-American System; however, the Court has made clear that this “does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.”⁶⁰⁶ The overriding concern is the vulnerability of the party whose rights have been violated. The Court took an example to illustrate potential absurd consequences of a rigid position excluding legal persons from the System’s protections:

if a landowner acquires a harvesting machine to work his fields and the Government confiscates it, he would be protected by Article 21. But if, instead of a landowner, it was a case of two poor farmers who formed a company to buy the same harvester and the Government confiscated it, they would not be able to invoke the American Convention because the harvester in question would be owned by a company. Now, if these same farmers, instead of constituting a company, bought the harvester in co-ownership, the Convention could protect them because, according to a principle that goes back to Roman law, co-ownership does not constitute a legal entity.⁶⁰⁷

With this example, the Court establishes that the farmer must have the possibility to benefit from the System’s protections. This example “emphasizes the importance that the Court places on this ‘vulnerability’ standard which frequently reappears, implicitly or explicitly, in its reasoning.”⁶⁰⁸

The Court’s position as a defender of the vulnerable is relevant in the context of PMSCs. Indeed, as discussed and illustrated in the case studies below, PMSCs often work in a position of power and their activities may place vulnerable parties in danger. Following this position of defender of the vulnerable, the Court has developed a range of jurisprudence relevant to PMSCs’ activities.

⁶⁰⁴ ACHR, Art. 2.

⁶⁰⁵ *Case of Cantos Case v Argentina*, IACtHR (2001), Series No. 85, § 29.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*, at § 25.

⁶⁰⁸ L. Hennebel, *supra* note 525, at 60.

6.2 Jurisprudence in the image of the Latin American reality

The dictatorships and massive human rights violations in the region's history have shaped the Inter-American System of Human Rights' objective to defend the vulnerable; this, in turn, has influenced its jurisprudence. The Court and Commission have developed abundant jurisprudence on *jus cogens* and state responsibility for non-state actors' activities. To address the recurrent context of states of emergency or internal tensions, the Court and the Commission have also restricted the extent to which state obligations may be limited in those situations.

6.2.1 Developing *jus cogens* and *erga omnes* norms

Jus cogens and *erga omnes* norms have a prominent place in the jurisprudence of the Inter-American System of Human Rights. A *jus cogens* norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."⁶⁰⁹ A related concept—*erga omnes*—"[l]iterally translated... means 'towards everyone.' The *erga omnes* concept explains which human rights violations are capable of giving rise to a separate right for a state to complain about the violating state's breach of its obligations concerning these basic rights."⁶¹⁰ The Court has referred to both of these concepts to elevate the level of protection afforded a given right, prohibit derogation from certain rights, and emphasize the scope and degree of state obligations.

The Inter-American jurisprudence on *jus cogens* lends credibility to the Inter-American System's capacity to regulate PMSCs because many of the rights affected by PMSCs' activities fall within the body of *jus cogens*, on which there is case law; similarly, the Inter-American institutions' positions on *erga omnes* norms apply to several of the obligations of states that hire or host PMSCs.

⁶⁰⁹ Vienna Convention on the Law of Treaties, (adopted May 23, 1969; entered into force January 27, 1980) 1155 UNTS 331, Art. 53.

⁶¹⁰ A. Clapham, *Human Rights Obligations of Non-State Actors*, *supra* note 368, at 96-97.

The Court has been active in identifying *jus cogens* norms including prohibitions on inhumane treatment (including corporal punishment),⁶¹¹ discrimination,⁶¹² crimes against humanity,⁶¹³ and the failure to punish perpetrators of crimes against humanity.⁶¹⁴ In the *Case of Zambrano-Vélez et al. v Ecuador*, the Court added to the canon of *jus cogens* norms by stating:

It is necessary to stress that no matter the circumstances in any State, there exists an absolute prohibition of torture, forced disappearances of individuals and summary and extrajudicial executions; and that such prohibition constitutes a mandatory rule of International Law not subject to derogation.⁶¹⁵

Despite the number of *jus cogens* norms enumerated in contentious cases, the Court has not limited itself to this arena and has also identified *jus cogens* norms in its advisory opinions. In its advisory opinion on Juridical Condition and Rights of the Undocumented Migrants, the Court suggested that the principles of equality and non-discrimination may have the status of *jus cogens*, stating that these principles “may be considered peremptory under general international law, inasmuch as [these principles apply] to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.”⁶¹⁶ The Court’s extensive jurisprudence regarding *jus cogens* norms means that “[t]he Inter-American Court has probably done [more] for [...] the expansion of *jus cogens* [...] than any other contemporary international tribunal.”⁶¹⁷

From the perspective of regulating PMSCs, the expansion of *jus cogens* in the Inter-American System is an important and advantageous element to consider. Several human rights violations committed by PMSCs’ employees in Latin America have implicated *jus cogens* norms. In Colombia, for example, PMSC contractors have been involved in the rape of minors.⁶¹⁸ The

⁶¹¹ *Case of Ximenes-Lopes v Brazil*, IACtHR (July 4, 2006), Series C, No. 149, § 126; *Case of Caesar v. Trinidad and Tobago*, IACtHR (March 11, 2005) Series C No 123, § 70.

⁶¹² *Case of Yatama v Nicaragua*, IACtHR (June 23, 2005), Series C, No. 127, § 184

⁶¹³ *Case of Almonacid-Arellano v Chile*, IACtHR (September 26, 2006), Series C, No. 154, § 99.

⁶¹⁴ *Case of Goiburú Case v Paraguay*, IACtHR (September 22, 2006), Series C, No. 153, § 131.

⁶¹⁵ *Case of Zambrano-Vélez et al. v. Ecuador*, IACtHR (July 4, 2007), Series C No 166, § 98.

⁶¹⁶ *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR (September 17, 2003), Advisory Opinion OC-18, Series A No. 18, §100. [hereinafter *Advisory Opinion on Undocumented Migrants*]

⁶¹⁷ Separate opinion of Judge Cançado Trindade on the *Case of Caesar v. Trinidad and Tobago*, *supra* note 603, § 92.

⁶¹⁸ See chapter on Colombia above, quoting “Investigan a dos militares de E.U. por violación de niña de 12 años en Comando Aéreo de Melgar”, *El Tiempo* (October 7, 2007).

Commission acknowledged in *Raquel Martí de Mejía v Perú*⁶¹⁹ that rape could rise to the level of torture, which constitutes an aggravated form of inhumane treatment and, thus, is prohibited by Article 5(2) of the American Convention.⁶²⁰ In this and other cases, both the Commission and the Court considered rape to constitute torture if it “ i) [was] intentional; ii) causes severe physical or mental suffering, and iii) [was] committed with any objective or purpose.”⁶²¹

The prohibition on torture at all times is also relevant for Mexico. In the Mexican context, analyzed below, PMSCs have been involved in training public forces in torture tactics.⁶²² In recent years, public forces have been involved in several documented cases of torture.⁶²³ If a link between the two facts were found—in other words, if PMSC A employee trained Person

⁶¹⁹ Raquel Mejía was a principal of a school for handicapped in Peru who was raped by a member of a counterinsurgency unit of the Peruvian military, see *Case of Raquel Martí de Mejía v. Perú*, IAComHR (1996) Case 10.970, Report No. 5/96, § 157. “The Commission states other cases before but recognize rape as an invasion of privacy, prohibited by Article 11 of the American Convention.” in C. Strumpen-Darrie, ‘Rape: A Survey of Current International Jurisprudence’, *HRbrief*, *Washington College of Law*, available at <http://www.wcl.american.edu/hrbrief/v7i3/rape.htm>.

⁶²⁰ The IAComHR consider three combined elements to classify rape as an act of torture: “1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; 2. it must be committed with a purpose; 3. it must be committed by a public official or by a private person acting at the instigation of the former.” In *Case of Raquel Martí de Mejía v. Perú*, *Ibid.*, at § 157.

⁶²¹ The most recent case brought to the Court is the case of two women raped by Mexican soldiers. The Commission first held that Mexico violated the women’s rights to non-discrimination, humane treatment, privacy, and juridical protection. Mexico failed to comply the recommendation made by the Commission, thus the Commission submitted the case to the Court asking it, among other charges, to consider the rape as torture. [*Case of Cantú et al. v. Mexico*, IACtHR (August 31, 2010), Preliminary Objections, Merits, Reparations, and Costs, Series C No 216, § 81] The Court concluded that Mexico was responsible for violating the rights to personal integrity and to private life and personal dignity enshrined in Articles 5(2) and 11(1) and 11(2) of the American Convention, in relation to Article 1(1) thereof, and Articles 1, 2, and 6 of the Inter-American Convention to Prevent and Punish Torture, and for the non-compliance of the obligation enshrined in Article 7(a) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. In its reasoning the Court recalls the Convention of Belém do Pará saying that “violence against women constitutes not only a violation of human rights, but is ‘an offense against human dignity and a manifestation of the historically unequal power relations between women and men,’ that ‘pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation.’” To consider the rape as a crime of torture the Court required that “the mistreatment fulfil[] the following requirements: i) intentional; ii) causes severe physical or mental suffering, and iii) is committed with any objective or purpose.” (*Case of Cantú et al. v. Mexico*, *Ibid.*, §§ 108-110). “The Court [also] finds that rape may constitute torture even when it is based in a single fact alone and takes place outside State facilities. This is so because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act.” *Case of Cantú et al. v. Mexico*, *Ibid.*, §118; See also *Case of Bueno Alves v. Argentina*, IACtHR (May 11, 2007), Series C No. 164, § 79.

⁶²² See Fox News, *Report Mexico cop in torture case fired*, July 19, 2008, available at http://www.foxnews.com/printer_friendly_wires/2008Jul19/0,4675,MexicoPoliceTorture,00.html. See also D. Bonello, ‘Mexican police in ‘torture’ class?’, *L.A. Blogtimes*, (July 1, 2008).

⁶²³ See Human Rights Watch, *Mexico: Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico’s “War on Drugs,”* (2011) available at <http://www.hrw.org/reports/2011/11/09/neither-rights-nor-security-0>.

B to torture, and Person B were found to have tortured—the PMSC and its employee should be considered to have been involved in the violation of a *jus cogens* norm. As companies are expected to not provide support for violations of human rights, this example raises potential corporate complicity issues as well.⁶²⁴

The concept of *jus cogens* plays different roles in the Court’s jurisprudence, and the function is not merely a rhetorical one.⁶²⁵ First, the classical function is that a *jus cogens* violation can serve to invalidate a treaty provision.⁶²⁶ The Court has used the concept to justify supremacy of the American Convention (and of international human rights law, in general), including over bilateral agreements.⁶²⁷ Second, a *jus cogens* violation can intensify the decision in a contentious case, increasing the level of condemnation and justifying a more extensive remedy.⁶²⁸ Third, *jus cogens* norms provide the Court with normative authority in the face of an OAS state that has not ratified the ACHR.⁶²⁹ Finally, the identification of *jus cogens* rules is a way for the Court to export norms universally.⁶³⁰

In addition to affecting the treatment of states that violate such norms, the classification of a norm as *jus cogens* also generates an *erga omnes* obligation binding on all states,⁶³¹ whether or not they have ratified the relevant convention.⁶³² The Court explained:

⁶²⁴ Corporate complicity “is an emerging area of law – it is also an area where moral questions are as important as legal ones – at least until there is more legal clarity - of what is good practice, what is right and wrong, fair and unfair. It extends from a situation where a company has knowingly funded, supported or benefited from human rights abuse to a situation where it has been a silent witness of abuse committed by others.” In I. Khan, *Understanding Corporate Complicity: Extending the Notion beyond Existing Laws*, Amnesty International, Dec 8, 2005, available at <http://www.amnesty.org/en/library/asset/POL34/001/2006/en/c866d1a9-d44b-11dd-8743-d305bea2b2c7/pol340012006en.pdf>. See also Chapter Five above (on corporate responsibility).

⁶²⁵ G. L. Neuman, *supra* note 26, at 117.

⁶²⁶ *Case of Aloeboetoe v Suriname*, IACtHR (September 10, 1993), Series C, No. 15, § 57.

⁶²⁷ *Case of Saramaka People v Suriname*, IACtHR (2007), Series C No. 172, § 140.

⁶²⁸ *Case of Goiburú v Paraguay*, *supra* note 614, §§ 128–132, 166; *Case of Gómez Paquiyauri Brothers*, *supra* note 310, § 76.

⁶²⁹ See for instance *Advisory Opinion on Undocumented Migrants*, *supra* note 616.

⁶³⁰ G. L. Neuman, *supra* note 26, at 117.

⁶³¹ The Court states in *Advisory Opinion on Undocumented Migrants* that this obligation “does not mean that [states] cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.” *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 118.

⁶³² “[T]he Court decides that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified

In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*). This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.⁶³³

Furthermore, there are two dimensions of the *erga omnes* concept. One is the horizontal dimension, in which states owe obligations to each other. The other one is the vertical dimension, which concerns the obligations states owe to those within their jurisdiction—this vertical dimension is the most important in the context of the Inter-American System’s potential to regulate PMSCs.

The Inter-American System has referred to the vertical dimension of the *erga omnes* concept when discussing the state obligation to protect human rights *vis-à-vis* business activities. In the *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court reminded the state of its duty to protect all persons within its jurisdiction, not only in relation to state acts but also regarding third-party actions.⁶³⁴ The Inter-American Court has also referred to such responsibilities in its advisory opinions, stating that an *erga omnes* norm is binding on all states and “give[s] rise to effects with regard to third parties, including individuals.”⁶³⁵ Thus, according to the Court, non-state actors—which would include, for instance, PMSCs—have human rights obligations. Arguably, *erga omnes* obligations apply to all entities, including both individuals and companies.⁶³⁶

Despite the Inter-American System’s robust jurisprudence on *jus cogens* and *erga omnes* norms, neither the Court nor the Commission has ever applied horizontal *erga omnes* and held

the [CCPR], regardless of whether or not they have ratified the American Convention or any of its optional protocols.” In *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 60.

⁶³³ *Ibid.*, § 140.

⁶³⁴ *Case of the Kichwa Indigenous People of Sarayaku*, IACtHR (June 27, 2012), Merits and reparations, §§ 244-249.

⁶³⁵ *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 100.

⁶³⁶ C. Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System*, Report on the American Convention on Human Rights, April, 2008, prepared for Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, Professor John Ruggie, available at <http://198.170.85.29/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf>, at 41, quoting: Separate Opinion Judge Cançado Trindade, *Case of Pueblo indígena de Sarayaku v Ecuador* IACtHR (June 17, 2005), § 20.

a non-state actor responsible for a violation of human rights. However, a promising development for the Inter-American System's regulation of PMSCs is that the Court has applied vertical *erga omnes*, finding states responsible for human rights violations committed on their territory by non-state actors.

6.2.2 Inter-American jurisprudence on non-state actors

In addition to its active identification of *jus cogens* obligations, the Inter-American Court of Human Rights has also created human rights obligations for non-state actors. Over time, the Court and the Commission have developed a progressive jurisprudence concerning private actors—including corporate entities—that holds promise for regulating PMSCs.

Since the beginning of its history, the Commission has considered the activities of non-state actors and the failure of the state to control their activities.⁶³⁷ For instance, the Commission mentioned non-state actors in a resolution in 1970, condemning “acts of political terrorism and urban or rural guerrilla terrorism, as they cause serious violations of the rights to life, personal security and physical freedom, freedom of thought, opinion and expression, and the rights to protection, upheld in the American Declaration and other international instruments.”⁶³⁸ Similarly, in 1981, the Commission stated, in the context of violence in Guatemala, that “the government must prevent and suppress acts of violence, even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise.”⁶³⁹ Towards the end of the 1990s, the Commission conducted a site visit in Ecuador and concluded that the failure of Ecuador to regulate oil companies' pollution affected the right to health of the people living in the Amazon.⁶⁴⁰

⁶³⁷ See *Annual Report of the Inter-American Commission on Human Rights 1990-1991*, IAComHR (1991), OEA/Ser.L/V/II.79.rev.1, 504–514. Quoting Resolution OEA/Ser.L/V/II.23, doc.19 rev. 1, April 16, 1970.

⁶³⁸ *Annual Report of the Inter-American Commission on Human Rights 1990-1991*, *ibid.* Discussed in A. Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993), at 120–124.

⁶³⁹ *Report on the Situation of Human Rights in the Republic of Guatemala*, IAComHR (1981), OEA/Ser.L/V/II.53, § 10.

⁶⁴⁰ *Report of the Situation of Human Rights in Ecuador*, IAComHR (1997), OEA/Ser.L/V/II.96.

Also beginning in the late 1990s, the Colombian armed conflict started to present an opportunity for both the Commission and the Court to develop jurisprudence concerning non-state actors.⁶⁴¹ The Commission, “through press releases and its public reports, appeal[ed] directly to rebel non-state actors in specific situations to respect lives, security, and health.”⁶⁴² In its 1999 report on Colombia, the Commission made a stronger statement about its jurisdiction over non-state actors, stating that its jurisdiction “also encompasses cases of transgressions of these same rights by private persons or groups who are, in effect, State agents or when such transgressions by private actors are acquiesced in, tolerated, or condoned by the State.”⁶⁴³ It further pointed out that: “the State has a duty under the American Convention and the Declaration to prevent and to investigate acts of violence committed by private parties and to prosecute and punish the perpetrators accordingly.”⁶⁴⁴

Starting with the *Case of Velásquez-Rodríguez*, the Court has joined the Commission in handling matters that relate to states obligations concerning private actors. In *Velásquez-Rodríguez*, the Court addressed an incident of kidnapping and found that it was not necessary for the Court to establish whether the act of kidnapping took place at the hands of state or not, because Honduras has the “duty to ensure” all rights in the American Convention.⁶⁴⁵ Because the state has a obligation of due diligence under the Convention:

[A]ny violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁶⁴⁶

Thus, “[i]t is the illegal act by the non-state actor that is seen here as a *violation* of human rights. State responsibility follows where the state has failed in its due diligence obligations

⁶⁴¹ A. Clapham, *Human Rights Obligations of Non-State Actors*, *supra* note 368, at 424.

⁶⁴² *Ibid.*

⁶⁴³ *Third Report on the Situation of Human Rights in Colombia*, IAComHR (1999), OEA/Ser.L/V/II.102, Ch IV.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Case of Velásquez Rodríguez v Honduras*, *supra* note 220.

⁶⁴⁶ *Ibid.*, § 172.

under the Convention.”⁶⁴⁷

The Court has continued developing its reasoning concerning state responsibility for human rights violations by non-state actors in the wake of *Velásquez-Rodríguez*. The Court has recognized that, in principle, only an “internationally wrongful act of a State entails the international responsibility of that State”⁶⁴⁸ and only conduct attributable to the state is an “act of state,”⁶⁴⁹ however, it has also held that the conduct of private actors may be attributed to states, in certain cases.⁶⁵⁰

Again, the Colombian armed conflict provided various opportunities for the Court to develop its jurisprudence on this topic because of the numerous massacres perpetrated by non-state actors—in this case, paramilitaries.⁶⁵¹ In these instances, the military did not participate directly in the massacres, but when paramilitaries did, the Colombian forces did not intervene to protect the population.⁶⁵² Even worse: sometimes the military moved out of an area just before the massacres in order to facilitate the paramilitaries’ activities.⁶⁵³

The Court’s reasoning regarding Colombia’s responsibility for the paramilitaries’ activities started with the consideration that

⁶⁴⁷ A. Clapham, *Human Rights Obligations of Non-State Actors*, *supra* note 368, at 424.

⁶⁴⁸ ILC Draft Article on State Responsibility, *supra* note 280, art. 1; quoted by the Court in *Case of the Mapiripán Massacre v. Colombia*, *supra* note 27.

⁶⁴⁹ ILC Draft Article on State Responsibility, *Ibid.*, art. 2 (a).

⁶⁵⁰ *Ibid.* Arts 4-11.

⁶⁵¹ *Case of the Mapiripán Massacre v Colombia*, *supra* note 27; *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27; See also *Case of the Rochela Massacre v Colombia*, IACtHR (May 11, 2007) Series C No. 163. In these cases, the Court also stressed the role of the state in the creation of the paramilitary groups in Colombia.

⁶⁵² *Case of Pueblo Bello Massacre v Colombia*, *supra* note 27, §§ 123–126 (discussing Colombia’s liability for violations of the right to life due to, *inter alia*, the government’s failure to adopt positive protective measures in light of the real and immediate risk to the victims of a massacre by paramilitary forces). See also *Case of the Mapiripán Massacre v Colombia*, *supra* note 27; and *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operación Génesis) v Colombia*, IACtHR (November 20, 2013), Series C No 270, §248, §§250-254, §§ 255-280.

⁶⁵³ *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operación Génesis) v. Colombia*, *Ibid.*, §§ 255-280. “Del mismo modo, aplicando las reglas de la lógica y de la sana crítica, es insostenible una hipótesis en la cual los paramilitares hubiesen podido llevar a cabo la “Operación Cacarica” sin la colaboración, o al menos la aquiescencia de agentes estatales, o que ello hubiese ocurrido sin que se presentaran enfrentamientos con las unidades de la fuerza pública en los lugares en donde ambos cuerpos armados se hicieron presentes y donde tendrían que haber coincidido” (§ 280).

[i]n order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as it is under domestic criminal law, the guilt of the perpetrators or their intention, nor is it necessary to identify individually the agents to whom the violations are attributed. It is sufficient to demonstrate that public authorities have supported or tolerated the violation of the rights established in the Convention.⁶⁵⁴

It thus held that “[i]t is a principle of international law that the State responds for the acts and omissions of its agents in their official capacity, even if they overstep the limits of their authority.”⁶⁵⁵

The Court has also repeatedly explained that states must take reasonable steps to prevent human rights violations by both state and non-state actors. In *Velázquez-Rodríguez* the Court stated:

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.⁶⁵⁶

Another context in which the Court has expressed concern about states fulfilling their responsibilities relates to the state’s regulation of services of public interest. In *Sawhoyamaxa*, the Court referred to the right to health and held that Paraguay violated the right to life of nineteen individuals who died because of lack of access to health care; stated more specifically, Paraguay failed to adequately regulate the provision of privately-provided health services.⁶⁵⁷ In another case, also related to the right to health, the Court analyzed health services as a service of public interest and found that the state had the responsibility to supervise the provision of this public service.⁶⁵⁸ The Court stated that

⁶⁵⁴ *Case of the 19 Tradesmen v Colombia*, IACtHR (July 3, 2004), Series C, No 109, § 141.

⁶⁵⁵ *Case of Mapiripán Massacre v Colombia*, *supra* note 27, § 108; *Case of the Pueblo Bello Massacre v Colombia*, *supra* note 27, § 111. See also: *Case of the Gómez Paquiyauri Brothers*, *supra* note 310, § 72; and, *Case of the “Five Pensioners”*, *supra* note 310, § 63.

⁶⁵⁶ *Case of Velásquez Rodríguez v. Honduras* *supra* note 220. See also *Godínez Cruz v. Honduras*, IACtHR (January, 20 1989), Series C No 3, § 175; *Case of Paniagua Morales v. Guatemala*, *supra* note 242, § 174.

⁶⁵⁷ *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR (March 29, 2006), Series C No 146.

⁶⁵⁸ *Ibid.*

when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the mentioned right.”⁶⁵⁹

Although the *Sawhoyamaza* and *Albán Cornejo* cases both happen to address the responsibilities of states regarding health services, the logic of the Court’s decision may be more broadly understood: there is a certain set of services that are in the public interest that the state must regulate and to which it must ensure access.⁶⁶⁰ Security, which is a public good, can also be understood as a service of public interest.⁶⁶¹ Following the logic of the Court, under the Inter-American System of Human Rights, states are responsible for supervising and regulating the provision of services of public interest, such as security, even though the service is being provided by private entities, such as PMSCs.

The Inter-American System of Human Rights has held that states have the positive obligation to prevent human rights violations by non-state actors, including by adequately regulating services of public interest. The Commission and the Court have issued various opinions expressing the view that states may be held responsible for private acts. Collectively, this jurisprudence of the Inter-American System addressing state responsibilities with respect to non-state actors provides valuable tools with potential for permitting regulation of PMSCs operating in the region.

6.2.3 Limitations to states’ obligations in the Inter-American System of Human Rights

Human rights law permits certain rights to be suspended under certain circumstances: ACHR Article 27⁶⁶² lists several rights that are protected even in “time of war, public danger, or other

⁶⁵⁹ *Case of Albán Cornejo v Ecuador*, IACtHR (November 22, 2007), Series C, No 171, § 119.

⁶⁶⁰ Public interest can be defined as the “ex ante welfare of the representative individual” in L. Sang Ho, *Public Policy and the Public Interest*, (London and New York: Routledge, 2011).

⁶⁶¹ “Economic theory describes a public good, in contrast to a private good, as one that is characterized by non-rivalry (anyone can use a good without diminishing its availability to others) and non-excludability (no one can be excluded from using the good). Clean air is an example because it is not depleted by the act of an individual breathing it, nor can it be appropriated by a few. Accordingly, public goods present values in which everyone has an interest.” In F. Cafaggi and D. D. Caron, ‘Global Public Goods amidst a Plurality of Legal Orders: A Symposium’, 23 (3) *EJIL* (2012), at 644.

⁶⁶² ACHR, Art. 27.

emergency that threatens the nation's independence or security,"⁶⁶³ and the Court has expanded on this list in subsequent rulings.⁶⁶⁴ The Court's restrictions on the situations in which rights can be limited is particularly important given the "the political culture of emergency within the Americas."⁶⁶⁵ In the region's history, exceptional measures have suspended the constitution or the rule of law on many occasions.⁶⁶⁶

The Inter-American institutions accept few excuses from states as valid for excusing non-compliance with their obligations under the American Convention. The jurisprudence on this issue has primarily addressed states' attempts to escape their duties to prevent, investigate, and prosecute any violations of human rights and to provide an effective remedy.⁶⁶⁷ In the *Case of Castillo Páez v. Peru*, the Court stated that a country's internal situation could not serve to limit the state obligation to prosecute.⁶⁶⁸ In this case, Peru tried to argue that its obligations were limited because of the situation of internal tensions produced by the activities of the armed group *Sendero Luminoso* (Shining Path); however, the Court responded that

the Peruvian state is obliged to investigate the events that produced [the violations]. Moreover, on the assumption that internal difficulties might prevent identification of the individuals

Suspension of Guarantees: 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

⁶⁶³ ACHR, Art. 27.

⁶⁶⁴ In several cases the Court extends the list of non-derogable rights: for example, the prohibition of torture is considered by the Court as *jus cogens*, the right to mental and physical integrity as an absolute right that cannot be suspended under any circumstance, and the right to access to justice as *jus cogens*. See *Case of Maritza Urrutia v Guatemala*, IACtHR (November 27, 2003), Series C No.103, § 92 (on torture); See also *Case of Tibi v Ecuador*, IACtHR (September 7, 2004) Series C No.114, § 143 and §145; *Case of Massacre de la Rochela v Colombia*, *supra* note 651, § 132; *Case of Bueno Alves v Argentine*, *supra* note 621, § 76. On physical integrity see *Case of Ximenes Lopes v Brazil*, *supra* note 611, § 126. On the right to access to justice, see *Case of Goiburú et al. v Paraguay*, *supra* note 614, § 131.

⁶⁶⁵ L. Burgorgue-Larsen and A. Úbeda de Torres, "War" in the Jurisprudence of the Inter- American Court of Human Rights', 33 (1) *Human Rights Quarterly* (February 2011), 148-174.

⁶⁶⁶ H. Gros Espiell, *La Convention américaine et la Convention européenne des droits de l'Homme—Analyse comparative* (Leiden: Martinus Nijhoff Publishers, 1989).

⁶⁶⁷ On states' obligations see Chapter Three, at 42-48.

⁶⁶⁸ *Case of Castillo Páez v Peru*, Merits, IACtHR (November 3, 1997), Series C No 34, § 90.

responsible for crimes of this kind, the victim's family still have the right to know what happened ... It is therefore incumbent on the state to use all the means at its disposal to satisfy these reasonable expectations. In addition to this duty to investigate, there is also the duty to prevent ... and to sanction those responsible for them. These Obligations on Peru shall remain in force until such time as they have been fully performed.⁶⁶⁹

Similarly, a situation of "transition" is not an argument to avoid state responsibility: in the *Case of Yvon Neptune v. Haiti*, the state argued that the difficulties of the justice system were due to the transition started in 1987.⁶⁷⁰ The Court rejected this argument.⁶⁷¹

States' obligations also include providing citizens access to "an effective remedy."⁶⁷² The Court has held that this obligation cannot be suspended even in situation of emergency: "the suspension of the legal remedies of habeas corpus or of 'amparo' in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention."⁶⁷³

The Court has referred to the principle of the continuity of the state in international law⁶⁷⁴ to explain its reticence to permit suspensions of human rights protections. Specifically, it has stated that the "continuity of the State [is] fundamental when determining its responsibility, irrespective of the political moment in the country when the alleged violations of the provisions of the American Convention occurred."⁶⁷⁵

⁶⁶⁹ *Ibid.*

⁶⁷⁰ "State's representative declared, referring to the deficiencies in the system of administration of justice in that country, that: 'given that since 1987 [Haiti is undergoing] a phase of transition, that judicial body was never established [*sic*]. To date, there has never been a law to implement the Articles of the Constitution [that refer to the High Court of Justice].'" In *Case of Yvon Neptune v Haiti*, IACtHR (May 6, 2008), Series C No 180, § 39.

⁶⁷¹ *Ibid.*

⁶⁷² On states' obligations see Chapter Three, at 42-48.

⁶⁷³ *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, IACtHR (January 30, 1987) Advisory Opinion, Series A No. 8, § 43.

⁶⁷⁴ "According to the principle of the continuity of the State in international law, responsibility exists irrespective of changes of Government over time and, specifically, from the time of the act that generates responsibility to the time when the act is declared unlawful. The foregoing is also valid in the area of human rights, although, from an ethical or political point of view, the attitude of the new Government is much more respectful of those rights than that of the Government in power when the violations occurred." in *Case of Velásquez Rodríguez v. Honduras*, *supra* note 220, § 184; and *Case of Godínez Cruz v. Honduras*, IACtHR (January 20, 1989), Series C No. 5, § 194.

⁶⁷⁵ *Case of Yvon Neptune v. Haiti*, *supra* note 670, § 41.

The history of Latin America is one that is rife with restrictions of rights, states of emergency, and suspensions of the rule of law. Genuine unavoidable issues, such as natural disasters, created some of these problems, while others were orchestrated by authoritarian regimes with designs of curtailing the rights of the people. If the Court were to take a more flexible stance regarding situations in which limiting rights protection is permissible, it is possible to imagine a reality in which rights were suspended more than they were in force. The jurisprudence of the IACtHR recognizes this and has taken a position that starkly limits the circumstances in which suspension of rights is acceptable.

The Inter-American System of Human Rights has been and still is a key actor in social and political development in Latin America and the Caribbean, focusing on the vulnerable against abuses of power and adapting itself to face the evolving realities of the region. Although the region's present is drastically different from its past, complex situations continue to arise with frequency as the next three chapters illustrate with the cases of the Colombia's armed conflict, the War on Drugs in Mexico, and the series of humanitarian crises in Haiti.

Chapter 7: Colombia

The ongoing armed conflict in Colombia has been a source of work for PMSCs. PMSCs in Colombia provide a large range of services, such as security for politicians, intelligence for the government, and fumigation of illicit coca fields.⁶⁷⁶ Moreover, the United States' support to Colombia, which has been privatized, contributes to the large number of PMSCs working in the country. This chapter analyzes, first, the situation and the law applicable in Colombia, then the second part of this chapter focuses on PMSCs' activities in Colombia and their regulation. Colombian domestic law is supposed to regulate PMSCs' activities in the country; however, lack of capacity makes control of their activities sporadic. Moreover, PMSCs working for the US are not subject to the Colombian law because of a bilateral agreement between the two countries. Thus, PMSCs are not effectively regulated in Colombia. Several violations of human rights in Colombia have involved PMSCs' employees, and some of those cases remain unpunished, which, as discussed above, should give rise to state responsibility.

7.1 Colombian armed conflict: definition of the situation

The history of violence in Colombia is long and complex. The presence of various organized armed groups, the intensity of the violence, and the duration of the conflict make the classification of the situation as an armed conflict unproblematic,⁶⁷⁷ and the NIAC has been recognized for many years now.⁶⁷⁸ However, several events have increased the complexity of the situation. On the one hand, the conflict has spilled across the border into Ecuador. And on the other hand, the US is supporting Colombia in its fight against armed groups through a

⁶⁷⁶ See US Department of State, Report to Congress On Certain Counternarcotics Activities in Colombia (2010) [hereinafter 2010 Report to Congress] (copy on file with author) and US Department of State, Report to Congress On Certain Counternarcotics Activities in Colombia (2007), available at <http://justf.org/files/primarydocs/0706cont.pdf> [hereinafter 2007 Report to Congress]. See also P. Medina, 'Los escoltas privados, la nueva papa caliente del Ministerio del Interior', *La silla vacía* Feb 2011, available at <http://www.lasillavacia.com/historia/los-escoltas-privados-la-nueva-papa-caliente-del-ministerio-del-interior-21288>.

⁶⁷⁷ The two conditions to classify a situation as an armed conflict are its intensity of violence and the presence of at least one organized armed group. See a detailed discussion on the topic in Chapter Eight on Mexico, below at

⁶⁷⁸ See discussion above on the history of the Colombia conflict.

cooperation agreement called Plan Colombia. Both of these realities further complicate the legal definition of the situation in Colombia.

7.1.1 The history of the Colombian conflict

The roots of the current war can be found in the late 1940s,⁶⁷⁹ when the assassination of the liberal presidential candidate gave rise to a civil war known as “La Violencia.”⁶⁸⁰ A few years later, a fragile peace built on a power-sharing deal between the liberals and the conservatives resulted in a pause in the violence.⁶⁸¹ However, the deal excluded the extreme left from any possible access to power.⁶⁸² Unable to access political power, parts of the left formed two guerrilla organizations that are still active today: *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (FARC, Revolutionary Armed Forces of Colombia) and *Ejército de Liberación Nacional* (ELN, National Liberation Army).⁶⁸³ In the mid-1960s, these organizations started to fight against the government, spawning a new armed conflict that endures as one of the longest-running active armed conflicts.⁶⁸⁴

In response to guerrillas’ actions, landowners and drug lords⁶⁸⁵ began to organize private armies.⁶⁸⁶ These private armies received support from the Colombian government and were

⁶⁷⁹ See for instance: G. Sánchez, *Guerre et Politique en Colombie* (Paris: L’Harmattan, 1998); E. Lair, ‘El Terror, Recurso Estratégico de los Actores Armados: Reflexiones en Torno al Conflicto Colombiano’, 37 *Análisis Político* (1999), 61-72.

⁶⁸⁰ L. A. Restrepo, ‘La guerra como sustitución de la política’, 3 *Análisis Político* 1988, 99 -116. See also: J.L. Esquirol, ‘Can International Law Help: An Analysis of the Colombian Peace Process’, 16 *Connecticut J Intl L* (2000), 23– 28.

⁶⁸¹ L. A. Restrepo, *supra* note 680; G. Sánchez Gómez, Rehabilitación y violencia bajo el Frente Nacional, 4 *Análisis Político* (1988), 26-53.

⁶⁸² *Ibid.*

⁶⁸³ E. Pizarro Leongómez, ‘Los orígenes del movimiento armado comunista en Colombia (1949-1966)’, 7 *Análisis Político* 1989, 3-35. On ELN see also: International Crisis Group, *Colombia: Perspectivas de Paz con el ELN*, Informe N° 2, Latinoamérica (2000), available at http://www.crisisgroup.org/~media/Files/latin-america/colombia/02_colombia_the_prospects_for_peace_with_the_eln_spanish.pdf.

⁶⁸⁴ Uppsala Conflict Data Program, Uppsala University, UCDP Conflict Encyclopedia: www.ucdp.uu.se/database. See also P. Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions - Mission to Colombia*, UNHCHR (31 March 2010) UN Doc A/HRC/14/24/Add.2, § 3.

⁶⁸⁵ During the 1970s, drug production and processing increased drastically in Colombia. Several cartels, such as the Cartel of Medellín (Ochoa Brothers and Pablo Escobar) and the Cartel of Cali (Rodríguez Orejuela brothers) became powerful and violent. See M. Rubio, ‘Colombia: Coexistence, Legal Confrontation, and War with Illegal Armed Groups’, in K. Casas-Zamora, (ed), *Dangerous Liaisons, Organized Crime and Political Finance in Latin America and Beyond* (Washington, DC: Brookings Institution Press, 2013) 76-107.

legitimized by state decrees.⁶⁸⁷ Later, they received international training for their fight against guerrilla groups, turning them into a strong paramilitary group.⁶⁸⁸ They massacred the guerrillas' social bases, real or presumed.⁶⁸⁹

During the 1980s, the Colombian conflict gained in intensity and became more urban.⁶⁹⁰ Several guerrilla groups that emerged during the 1970s—such as the *Movimiento 19 de abril* (M-19, April 19 Movement)—intensified their activities.⁶⁹¹ An attempt of negotiation between the government, under the administration of Belisario Betancur (1982-1986), and several guerrilla groups failed.⁶⁹² In the framework of peace negotiations, the FARC and the ELN created a political party, *Union Patriota* (UP, Patriotic Union), but the majority of *guerrilleros* who tried to demobilize and participate in politics were assassinated.⁶⁹³ Between 3,000 and 4,000 members of the UP were assassinated.⁶⁹⁴ In 1985, the M-19 broke the truce and occupied the *Palacio de Justicia*—the building that houses the Supreme Court—and the

⁶⁸⁶ See for instance: E. Cruz Rodríguez, 'Los estudios sobre el paramilitarismo en Colombia', 60 *Análisis Político* 2007, 117-134.

⁶⁸⁷ The Decree authorized citizens to organize and arm themselves for their own protection. Decreto-ley 3398 de 1965, which became a permanent legislation in 1968 (Ley 48); See also *Case of the 19 Tradesmen v Colombia*, IACtHR (July 5, 2004), Series C No 109, § 84.

⁶⁸⁸ On the paramilitary groups see: G. Duncan, *Los Señores de la Guerra: de paramilitares, mafiosos y autodefensas en Colombia*, (Bogotá: Editorial Planeta, 2006); M. Romero Vidal, *Paramilitares y Autodefensas, 1982-2003*, (Bogotá: Planeta-IEPRI, 2003); M. Romero Vidal 'Paramilitares, narcotráfico y contrainsurgencia: Una experiencia para no repetir', in F. Leal, *La Encrucijada: Colombia en el Siglo XXI*, (Bogotá: Norma-Ceso-Universidad de los Andes, 2006). On the international training see the history of Yair Klein discussed in the first part of Chapter 2 of this study.

⁶⁸⁹ M. Romero Vidal, *Paramilitares y Autodefensas, 1982-2003*, *supra* note 688. See also A. Rangel, *Guerra Insurgente, Conflictos en Malasia, Perú, Filipinas, El Salvador y Colombia*, (Bogotá: Intermedio, 2001).

⁶⁹⁰ E. Lair, 'Colombia: una guerra contra los civiles', 49/50 *Revista Colombia International* (2000), 135-147.

⁶⁹¹ *Ibid.* The guerrilla groups M-19 was created in 1973. See also the guerrilla group Quintín Lame created in 1983. On Quintín Lame, see for instance: V. Laurent, 'Población Indígena y Participación Política en Colombia', 31 *Análisis Político* 1997, 65-84.

⁶⁹² H. F. Kline, *Chronicle of a Failure Foretold: the Peace Process of Colombian President Andrés Pastrana*, (Tuscaloosa: University of Alabama Press, 2007), at 17.

⁶⁹³ Two other guerrilla groups also participated in the creation of the UP: the *Movimiento de Autodefensa Obrera* (ADO, self defence movement of workers) and two demobilized fronts of the ELN. The Communist Party also participated in the creation of the UP. See for instance Amnesty International, *Colombia: Political violence in Colombia: myth and reality*, January 23, 1994, available at <http://www.amnesty.org/en/library/asset/AMR23/001/1994/en/f7206fa0-ec11-11dd-85b9-0939011eabc9/amr230011994en.html>. See also: 'La Unión Patriótica vuelve a la arena política', *Semana*, July 3, 2013, available at <http://www.semana.com/nacion/articulo/la-union-patriotica-vuelve-arena-politica/350213-3>.

⁶⁹⁴ D. Pécaut, 'Violencia y Democracia', 13 *Análisis Político* (1991), 40-60; See also O. John. 'Fighting Among Themselves', *Houston Chronicle*, August 3, 2001, available at <http://www.chron.com/cs/CDA/story.hts/special/rebelheld/986658>.

resulting military intervention ended in the massacre of more than a hundred people.⁶⁹⁵

Around the same time, drug-related violence was exploding. Cartels, such as the Cartel of Medellin and its boss, Pablo Escobar, became richer during the 1970s and 1980s thanks to the exportation of cocaine to the US and gained access to massive weaponry.⁶⁹⁶ During the 1980s, they “revolted against the government's threats to extradite the traffickers to the United States. Pablo Escobar is thought to be responsible for the murder of hundreds of government officials, police, prosecutors, judges, journalists and innocent bystanders.”⁶⁹⁷

The bloodiest decade came to a close with an incomplete peace process resulting in a new constitution in 1991.⁶⁹⁸ The new constitution created more inclusive institutions and positive human rights protections; however, it did not include any land reform, the FARC's most important request.⁶⁹⁹ The negotiation model was different from the Betancur administration; this time the Colombian government negotiated with guerilla groups one by one. Several guerrilla groups, including M-19, signed a peace agreement and demobilized; however, the FARC and ELN did not demobilize, and neither did the paramilitaries.⁷⁰⁰

The decade of the 1990s was marked by a change in the guerrilla strategy.⁷⁰¹ The FARC

⁶⁹⁵ On the assault on the Palacio de Justicia in 1985 see for instance: E. E. Sánchez-Blake, *Patria se escribe con sangre* (Barcelona: Anthropos Editorial, 2000), at 132. See also: ‘¿Hubo narcos en la toma del Palacio?’, *Semana* (October 10, 2004), available at <http://www.semana.com/portada/articulo/hubo-narcos-toma-del-palacio/68664-3>.

⁶⁹⁶ See for instance: A. Salazar, *La Parábola de Pablo: Auge y Caída de un Gran Capo del Narcotráfico* (Bogotá: Editorial Planeta, 2001).

⁶⁹⁷ ‘The Colombian cartels’, *Frontlines*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/business/inside/colombian.html>.

⁶⁹⁸ A. J. Carrillo, ‘Truth, Justice, and Reparations in Colombia: The Path to Peace and Reconciliation’, in V. Bouvier, (ed) *Colombia: Building Peace in a Time of War*, (Washington DC: United States Institute for Peace, 2009) at 148.

⁶⁹⁹ See the ‘Dossier: La Constitución de 1991’ 13 *Análisis Político* (1991) 60-82; See the Colombian Constitution: Constitución Política de Colombia 1991, available at http://www.secretariassenado.gov.co/senado/basedoc/cp/constitucion_politica_1991.html. See also A. -M. Bejarano, ‘Consitution of 1991, An Institutional Evaluation Seven Year Later’, in C. Bergquist, R. Peñaranda, and G. Sánchez Gómez, (eds) *Violence in Colombia, 1990-2000: Waging War and Negotiating Peace* (New York: Rowman and Littlefield, 2001), 53-74.

⁷⁰⁰ G. Sánchez Gómez, ‘Introduction, Problems of Violence, Prospect for Peace’, in C. Bergquist, R. Peñaranda, and G. Sánchez Gómez, (eds) *ibid.*, at 25.

⁷⁰¹ C. Echandía, *Dos Décadas de Escalamiento del Conflicto Armado Colombiano*. (Bogotá: Universidad Externado de Colombia, 2006).

decided to enter into a “total war,” and to finance this by participating in drug trafficking.⁷⁰² Their resulting growth was impressive: in 1985 they were present in 173 municipalities while ten years later they were in 622 of the 1123 Colombian municipalities.⁷⁰³ The new strategy transformed the entire country into a theater of armed confrontation.⁷⁰⁴ In 1998, the FARC were able to take over several military bases and to occupy the capital of a department.⁷⁰⁵ The paramilitaries, for their part, were also becoming stronger, focusing on two activities: drug trafficking and terror against the population that was presumed to support the guerrilla.⁷⁰⁶ In 1997, the paramilitary groups merged under an umbrella organization called the *Autodefensas Unidas de Colombia* (AUC).⁷⁰⁷

With the close of the 1990s, yet another decade ended with incomplete peace negotiations.⁷⁰⁸ This time the Pastrana administration (1998-2002) and the FARC were at the table.⁷⁰⁹ The government agreed to give a piece of land as large as Switzerland to the FARC, who would be in charge of its administration for the duration of the peace process.⁷¹⁰ The negotiation ended in 2002 when the FARC’s chief did not appear at the table of negotiation.⁷¹¹ Meanwhile, in 1999, the US and Colombia reinforced their collaboration through a new plan of cooperation

⁷⁰² See for instance: W. Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford: Oxford University Press, 1999), at 213.

⁷⁰³ C. Echandía, *supra* note 701; See also C. Peña, ‘La Guerilla Resiste Muchas Miradas el Crecimiento de la FARC en los Municipios Cercanos a Bogotá: Caso del Frente 22 en Cudinamarca’, 32 *Análisis Político* (1997), 85-102.

⁷⁰⁴ C. Echandía, *supra* note 701.

⁷⁰⁵ F. Leal, *La Inseguridad de la Seguridad, Colombia 1958-2005* (Bogotá: Editorial Planeta, 2006); In A. Rangel, *supra* note 689.

⁷⁰⁶ C. Echandía, *supra* note 701; see also: “Los grupos paramilitares tienen como principal forma de acción el uso del terror contra la población que, según ellos, ellos sirven de apoyo activo o pasivo a las guerrillas en las zonas rurales. Por medio del asesinato selectivo y de la masacre indiscriminada, buscan aterrorizar tanto a las personas que mantienen alguna vinculación con los grupos insurgente, como aquellas que no, de manera que todos sientan el peligro inminente de ser víctimas de la acción criminal.” In A. Rangel, *supra* note 689.

⁷⁰⁷ Human Rights Watch, *Colombia's Military Linked to Paramilitary Atrocities, February*, (2000), available at <http://www.hrw.org/news/2000/02/22/colombias-military-linked-paramilitary-atrocities>. As mentioned in Chapter Five, the AUC also received funding from private companies, such as Chiquita.

⁷⁰⁸ J. M. Ospina Restepo, ‘La paz que no llegó: enseñanzas de una negociación fallida’, 2 (2) *Revista Opera*, (2002) 59-85.

⁷⁰⁹ See H. F. Kline, *supra* note 692.

⁷¹⁰ N. Espinosa and D. Ruiz, ‘Caminando al Despeje’, 44 *Análisis Político* (2001) 104-119.

⁷¹¹ See for instance: ‘La silla vacía, hace diez años’, *El Espectador*, January 6, 2009, available at www.elespectador.com/impreso/tema-del-dia/articuloimpreso104886-silla-vacia-hace-diez-anos.

called Plan Colombia: Plan for Peace, Prosperity, and the Strengthening of the State (hereinafter Plan Colombia).⁷¹²

The peace talks having failed, the armed conflict continued in the 2000s.⁷¹³ The Uribe administration (2002-2010) chose a different tactic. On the one hand, the administration strongly attacked the guerrillas and increased its cooperation with the US.⁷¹⁴ And on the other hand, it negotiated with the AUC and managed to demobilize the majority of the paramilitary forces.⁷¹⁵ The violence against the population was mainly produced by paramilitary activities, so their demobilization resulted in a decrease in the intensity of the violence.

A few years after the demobilization of the AUC new groups called BACRIMs (*bandas criminales*, criminal bands) emerged, sometimes described as a new generations of paramilitaries.⁷¹⁶ While these groups are mostly composed of demobilized paramilitaries, they are not a direct reorganization of the paramilitaries—for instance, they are not receiving any state support—however, there are some similarities between the BACRIMs and their paramilitary predecessors.⁷¹⁷ Like the paramilitaries, the BACRIMs' activities are closely related to drug trafficking, but they use violence to secure drug trafficking routes rather than

⁷¹² Plan Colombia: Plan for Peace, Prosperity, and the Strengthening of the State (1999). [hereinafter Plan Colombia]. See also U.S. Department of State, Plan Colombia, available at <http://bogota.usembassy.gov/plancolombia.html>. On Plan Colombia see: N. M. Serafino, *Colombia: Plan Colombia Legislation and Assistance (FY2000-FY2001)*, Congressional Research Service, Report for Congress (Washington, DC, 2001); C. Veillette, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance*, Congressional Research Service, Report for Congress (Washington, DC, 2005); F. Massé, *Les Etats-Unis et l'Europe face au conflit colombien*, Les Études du CERI, Centre d'études et de recherches internationales, Sciences Po (2003).

⁷¹³ J. M. Ospina Restepo, *supra* note 708.

⁷¹⁴ See for instance: D. M. Rojas, 'Much more than a war on drugs: elementos para un balance del Plan Colombia', 77 *Análisis Político* (2013) 113-132; F. Leal Buitrago, 'La Política de Seguridad Democrática 2002-2005', 57 *Análisis Político* (2006) 3-30.

⁷¹⁵ J. Grajales, 'El proceso de desmovilización de los paramilitares en Colombia: entre lo político y lo judicial', 23:II *Desafíos* (2011) 149-194. See also F. Massé, (coord.), *La Evolución de las Estructuras Armadas Post-desmovilización: Pasado, Presente y Futuro*, Tercer Informe del Observatorio de DDR y Ley de Justicia y Paz, Centro Internacional de Toledo para la Paz, (Madrid, 2010).

⁷¹⁶ S. Granada, J. A. Restrepo, and A. Tobón García, 'Neoparamilitarismo en Colombia: una herramienta conceptual para la interpretación de dinámicas recientes del conflicto armado colombiano' in J. A. Restrepo and D. Aponte, (eds) *Guerra y Violencia en Colombia: gerramientas e interpretaciones* (Bogota: Editorial Pontificia Universidad Javeriana, 2009). See also F. Massé, '¿Bandas criminales o neoparamilitares?', 11 *Foreign Affairs Latinoamérica* (2011) 42-49, available at <http://www.revistafal.com/historicopdf/2011/2/bandas.pdf>

⁷¹⁷ F. Massé, *Ibid.* See also D. M. Rico, *La Dimensión Internacional del Crimen Organizado en Colombia: Las Bacrim, sus Rutas y Refugios*, April 2013, Wilson Center, <http://www.wilsoncenter.org/sites/default/files/Daniel%20Rico.pdf>. See also M. Vidal Romero and A. Arias Ortiz, "'Bandas Criminales", Seguridad Democrática y corrupción', 14 *Revistas Arcanos*, (2008).

having any counterinsurgency objective.⁷¹⁸

The US support, which started under the Pastrana administration and continued under Uribe, allowed for a restructuring the Colombian army. As the result, the Colombian forces were able to abandon their defensive position and retake the lead, forcing the guerrillas to return to their prior strategy.⁷¹⁹ The FARC suffered severe defeats and lost control of much the territory they were controlling before.⁷²⁰

In 2012, President Santos, who had served as defense minister in Uribe administration, initiated new peace talks with the FARC.⁷²¹ Unlike the 1998-2002 peace talks, there is no demilitarized territory and the hostilities between the FARC and the government are still ongoing.⁷²² At the time of this writing (August 2014), the negotiations have advanced on several topics. The two parties have agreed on land reform⁷²³ and political participation, but four items remain to be negotiated: victims' rights, illicit crop cultivation and drug trafficking, the end of the conflict and the demobilization of member of the guerrilla, and the mechanisms of ratification and implementation of the peace agreement.⁷²⁴

So far, the peace negotiations have a long way to go in order to succeed, and the classification of the situation has not yet been affected by these talks; however, the classification of the

⁷¹⁸ F. Massé, '¿Bandas criminales o neoparamilitares?', *supra* note 716. See also G. I. Arias and E. M. Restrepo; *The Changing Remnants of the Colombian Paramilitary and their Impact in the region*, Congress of the Latin American Studies Association (2010), available at <http://lasa.international.pitt.edu/members/congress-papers/lasa2010/files/4138.pdf>.

⁷¹⁹ C. Echandía and E. Bechara Gómez, 'Conducta de la guerrilla durante el gobierno Uribe Vélez: de las lógicas de control territorial a las lógicas de control estratégico', 57 *Análisis Político* (2006) 31-54.

⁷²⁰ C. Echandía, *supra* note 701; See also J McDermott, 'Colombia's Rebels: A Fading Force?' *BBC News* (February 1, 2008) <http://news.bbc.co.uk/2/hi/americas/7217817.stm>.

⁷²¹ J. C. González and W. Neuman, 'Colombia explores talks with FARC', *New York Times* (August 28, 2012), available at <http://www.nytimes.com/2012/08/28/world/americas/colombia-in-exploratory-talks-with-farc.html>.

⁷²² W. Neuman and J. C. González, 'Colombia will start peace process with FARC', *New York Times* (September 4, 2012), available at http://www.nytimes.com/2012/09/05/world/americas/colombia-will-restart-peace-process-with-farc.html?_r=0.

⁷²³ 'Colombian government and FARC reach deal on agrarian reform', *Colombian Report* (May 26, 2013), available at <http://colombiareports.co/colombian-government-and-farc-reach-deal-on-agrarian-reform/>.

⁷²⁴ See the Joint Communiqué by the Colombian government and the FARC: 'Lea el comunicado conjunto tras acuerdo en participación política', *El Tiempo*, (November 6, 2013) available at <http://www.eltiempo.com/archivo/documento/CMS-13163052>. See the agreement for the start of peace negotiations and the content of the agenda for the negotiations in Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera, available at <https://www.mesadeconversaciones.com.co/sites/default/files/AcuerdoGeneralTerminacionConflicto.pdf>.

Colombian situation as an armed conflict has been under debate on several occasions in the past. For instance, former president Uribe argued that there was no armed conflict in Colombia, indicating that the guerrilla and paramilitaries were “terrorists” and should not be considered combatants.⁷²⁵ However, a “legal classification depend[s] upon facts themselves and not upon the views on the facts of those subject to the law.”⁷²⁶

Even though there is no definition of armed conflict in IHL, international jurisprudence provides two conditions to determine if a situation is one of internal tensions or of armed conflict: the intensity of the conflict and the organization of the parties.⁷²⁷ For instance, the International Criminal Tribunal for the former Yugoslavia first stated in 1997:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal [...] character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law [...]⁷²⁸

The Tribunal reiterated the same two conditions in 2005:

the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.⁷²⁹

The intensity of the conflict can be analyzed through an examination of factors including the duration of the conflict, the frequency of the acts of violence and military operations, and the

⁷²⁵ On June 19, 2003 President Uribe stated before the Inter-American Court: “I don’t acknowledge Colombian armed groups, neither the guerilla nor the paramilitaries, as having the status of combatants; my government considers them to be terrorists.” (“No reconozco a los grupos violentos de Colombia, ni a la guerrilla ni a los paramilitares, la condición de combatientes; mi gobierno los señala como terroristas,”) in R. Nieto Navia, *¿Hay o no hay conflicto armado en Colombia?*, *Anuario Colombiano de Derecho Internacional* (2008), 139-159.

⁷²⁶ M. Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’, *Harvard University Occasional Paper No 6*, Program on Humanitarian Policy and Conflict Research (2006), at 75 <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf>.

⁷²⁷ S. Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, 91 *Int’l Rev. of the Red Cross* (2009), 69, at 70 available at <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>.

⁷²⁸ *Prosecutor v Tadić*, ICTY (May 7, 1997), Judgment, IT-94–1-T, § 562.

⁷²⁹ *Prosecutor v Limaj*, ICTY (November 30, 2005), Judgment, IT-03-66-T.

nature of the weapons used.⁷³⁰ Meanwhile, the organization of the parties is often evaluated by considering whether or not at least one armed group has a chain of command.⁷³¹

A recent report from the Colombian government estimates the number of victims of the conflict since its beginning in the 1960s to be 5.7 million, which includes 220,000 fatalities, 25,000 disappearances, and 30,000 hostages.⁷³² Even though the intensity of the violence has decreased in the past decade and the peace talks are ongoing, the FARC are maintaining a high level of activity. In 2013, more than 2,000 violent actions in 242 municipalities were attributed to the FARC.⁷³³ This is a similar level of activity to what has been recorded annually since 2010.⁷³⁴ It is also worth noting that the FARC are heavily armed, even with a capacity to destroy planes.⁷³⁵ Considering the number of victims and that the violence started over fifty years ago, it is evident that the intensity of the violence in Colombia rises to the level required for the situation to be considered an armed conflict. [See appendix I]

The second condition—the organization of the parties—is also met in Colombia. The FARC, the most powerful active armed group, are a well-organized armed group with a military structure and known commandants.⁷³⁶ The second most powerful guerrilla group, the ELN, are less structured than the FARC but still have a clear chain of command.⁷³⁷ The current government recognizes both the FARC and the ELN as belligerents in the Colombian armed conflict.⁷³⁸ Thus, Colombia can be classified as an armed conflict.

⁷³⁰ See for instance, S. Vité, *supra* note 727, at 70.

⁷³¹ *Ibid.*

⁷³² Centro Nacional de Memoria Histórica (CNMH), *Basta ya! Colombia: memorias de guerra y dignidad*, Informe General (2013), available at <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-memorias-guerra-dignidad-12-sept.pdf>.

⁷³³ 'Farc mantuvieron su actividad durante 2013 con 2.075 acciones violentas', *El Espectador* (December 18, 2013), available at <http://www.elespectador.com/noticias/judicial/farc-mantuvieron-su-actividad-durante-2013-2075-accione-articulo-464952>.

⁷³⁴ *Ibid.*

⁷³⁵ 'Farc derribaron avión militar con ametralladoras punto 50, según correo interno', *Vanguardia* (July 17, 2012), available at <http://www.vanguardia.com/actualidad/colombia/165818-farc-derribaron-avion-militar-con-ametralladoras-punto-50-segun-correo-in>.

⁷³⁶ D. Pécaut, *Las FARC: Una guerrilla sin fin?* (Bogotá: Norma, 2008).

⁷³⁷ The structure of the FARC, their organization, and their activities are presented on their official webpage <http://www.farc-ep.co/>.

⁷³⁸ The current government has recognized the FARC and ELN as Parties of the armed conflict in the Law on Victims and, later, in the Legal Framework for Peace. (See *infra* note 741.) See also 'Marco Legal para la Paz ya

A third group—the BACRIMs—could also be part of the armed conflict. However, in 2012 the Colombian Congress voted on a legal framework for peace outlining the terms of a possible peace negotiation, and it excluded the BACRIMs from the framework, considering that criminals are not part of the Colombian armed conflict.⁷³⁹ On the one hand, the exclusion of BACRIMs from the framework for peace is understandable considering that there is no political will to negotiate with criminals; furthermore, including the BACRIMs as party of the armed conflict could increase the impunity for some of their violations of human rights.⁷⁴⁰ On the other hand, however, classifying them as mere criminals prevents victims of their crimes from benefiting from the 2011 Victims Law, which permits victims of the armed conflict to have access to reparations.⁷⁴¹

In a January 2014 statement, the ICC stated that the BACRIM group *Urabeños* had reached a level that merits monitoring. The group is organized enough and “could become part of the armed civil conflict” but the current level of conflict between the BACRIM and the state forces, or the BACRIM and the guerrillas is not “sufficiently intense” to be considered an armed conflict.⁷⁴² If the Colombian government were to follow the ICC’s suggestion, it would

es reforma constitucional’, *el Colombiano* (June 2012), available at http://www.elcolombiano.com/BancoConocimiento/M/marco_legal_para_la_paz_ya_es_reforma_constitucional/marco_legal_para_la_paz_ya_es_reforma_constitucional.asp. See also Un paso histórico, *Semana* (May 28, 2011), available at <http://www.semana.com/nacion/ley-victimas-paso-historico/157521-3.aspx>.

⁷³⁹ Congreso de la Republica de Colombia, Acto Legislativo “por medio del cual se establecen instrumentos juridicos de justicia transicional en el marco del articulo 22 de la constitucion politica y se dictan otras disposiciones July 31, 2012, available at <http://wsp.presidencia.gov.co/Normativa/actos-legislativos/Documents/2012/ACTO%20LEGISLATIVO%20N%C2%B0%2001%20DEL%2031%20DE%20JULIO%20DE%202012.pdf>; on BACRIM see S. Palomino, Las Bacrim tendrían unos seis mil hombres, en seis estructuras, *Semana* (January 2011), available at <http://www.semana.com/nacion/articulo/las-bacrim-tendrian-unos-seis-mil-hombres-seis-estructuras/234266-3>. See also International Crisis Group, ‘Colombia’s New Armed Groups’, Latin American Report N°20 (May 10, 2007), available at http://www.crisisgroup.org/en/regions/latin-america-caribbean/andes/colombia/020_colombias_new_armed_groups.aspx; International Crisis Group, *Dismantling Colombia’s New Illegal Armed Groups: Lessons from a Surrender*, Latin America Report N°41 (8 June 2012), available at <http://www.crisisgroup.org/~media/Files/latin-america/colombia/41-dismantling-colombias-new-illegal-armed-groups-lessons-from-a-surrender.pdf>.

⁷⁴⁰ Human Rights Watch, *Colombia: Fix Flaws in Transitional Justice Bill*, (June 12, 2012), available at http://www.hrw.org/sites/default/files/related_material/HRW%20-%20Colombia%20-%20Fix%20Flaws%20in%20Transitional%20Justice%20Bill%206-12-12.pdf.

⁷⁴¹ Congreso de la Republica de Colombia, Ley 1448, Ley de Víctimas y Restitución de Tierras June 2011, available at <http://www.leydevictimas.gov.co/documents/10179/19132/completo.pdf>.

⁷⁴² ‘Urabeños’, en el radar de la Corte Penal Internacional’, *El Tiempo* (January 22, 2014), available at http://www.eltiempo.com/justicia/corte-penal-internacional-lanza-alerta-sobre-los-urabenos_13397763-4; See also M. Perez-Santiago, ‘Colombia’s BACRIM: Common Criminals or Actors in Armed Conflict?’, *InSight*

not only be fighting against armed groups in an armed conflict, but it would also be in charge of a law enforcement initiative against groups like BACRIMs.

Not considering the BACRIMs to be part of the Colombian armed conflict means that the Colombian government cannot use the same approach to fight the FARC as the BACRIMs. The Colombian army, which works in both the law enforcement and combat contexts, “distinguishes between two kinds of operations: first, operations during hostile scenarios (Operaciones en escenarios de hostilidades) and second, operations to maintain security (Operaciones para el mantenimiento de la seguridad).”⁷⁴³ This means that IHRL, and not IHL, applies to the particular fight against the BACRIMs.

Thus, the current Colombian armed conflict is a NIAC in which the state confronts two main guerrilla opponents: the FARC and the ELN. As Colombia has ratified the Geneva Convention, IHL applies (Common Article 3 to the four Geneva Conventions and Additional Protocol 2). Nevertheless, the identification and classification of the domestic actors of the Colombian NIAC does not clarify the whole situation. The way the armed conflict has evolved has complicated the situation.

7.1.2 The exportation of the NIAC

Recently, the armed conflict has extended beyond the Colombian territory, complicating the definition of the situation. The NIAC has overflowed the Colombian borders: the FARC are based in Colombia and they cross the border, into Ecuador and Venezuela, to protect themselves from attack by the Colombian army.⁷⁴⁴ The army, in turn, simply decides to also

Crime, available at <http://www.insightcrime.org/news-analysis/colombias-bacrim-common-criminals-or-actors-in-armed-conflict>.

⁷⁴³ C. Von der Groeben, ‘The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Force’, 16 (1) *J Conflict Security Law* (2011), at 150.

⁷⁴⁴ See for instance, N. Inkster and J. Lockhart-Smit, *The Farc Files: Venezuela, Ecuador and the Secret Archive of 'Raúl Reyes'*, (London: International Institute for Strategic Studies, 2011).

cross the border, violating Ecuadorian sovereignty.⁷⁴⁵ The most significant, and controversial, event was the bombing of a FARC camp in Ecuador in 2008 without Ecuador's consent, creating a diplomatic conflict between the two countries.⁷⁴⁶

The fact that a NIAC is "exported" and becomes territorially international does not mean that it becomes an IAC. An IAC is an armed conflict between at least two states, and in this case, Ecuador expressed its disagreement with the violation of its sovereignty and ended its diplomatic relations with Colombia, but an armed conflict never began.⁷⁴⁷ Some authors consider that when a NIAC spills over into another state, it becomes a new type of conflict that is not included in current law: "non-international conflicts exported."⁷⁴⁸ These exported NIACs can be defined in this way:

The parties to a classic non-international armed conflict (within the meaning of common Article 3 or of Additional Protocol II) may well continue their fighting on the territory of one or more third States with the explicit or tacit consent of the government(s) concerned (These are known as 'exported' or 'delocalized' conflicts, or 'extraterritorial' non-international armed conflicts.) In principle, the government forces involved are pursuing the armed group seeking refuge in the territory of a neighbouring State.⁷⁴⁹

Some authors suggest that a new regime should be created during the exportation of the armed conflict. This regime would include some elements of both IHL regimes, those applicable to NIAC and IAC. In these situations, some provisions of IHL of IAC may apply, such as treatment of civilians in enemy hands; the principle of distinction; protection and treatment of

⁷⁴⁵ See a list the violation of the Ecuadorian sovereignty by Colombian forces in: 'Ecuador rompió relaciones diplomáticas con Colombia', *El Universo* (March 04, 2008), available at <http://www.eluniverso.com/2008/03/04/0001/8/28856F4B00344C5CA09A3F78A7628CEC.html>.

⁷⁴⁶ See 'Raúl Reyes, 'canciller' y miembro del Secretariado de las Farc, fue muerto en combate en Ecuador', *Semana* (March 1, 2008), available at <http://www.semana.com/on-line/articulo/raul-reyes-canciller-miembro-del-secretariado-farc-muerto-combate-ecuador/91318-3>; 'Cinco cosas que no volvieron a ser iguales después del ataque a Reyes', *Semana* (March 2, 2009), available at <http://www.semana.com/nacion/conflicto-armado/articulo/cinco-cosas-no-volvieron-iguales-despues-del-ataque-reyes/100656-3>; 'La verdad del bombardeo', *Semana* (December 12, 2009), available at <http://www.semana.com/nacion/articulo/la-verdad-del-bombardeo/110971-3>.

⁷⁴⁷ *Ibid.*

⁷⁴⁸ R. S. Schöndorf, 'Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?', 37 (1) *New York University Journal of International Law and Politics* (2004), 61–75; G. S. Corn, 'Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict', 40 (2) *Vanderbilt Journal of Transnational Law*, (March 2007); G. S. Corn and E. Talbot Jensen, 'Transnational Armed Conflict: a "Principled" Approach to the Regulation of Counter-Terror Combat Operations', 42 *Israel Law Review* (2009), 1–34.

⁷⁴⁹ S. Vité, *supra* note 727, at 89.

the wounded, sick, and shipwrecked; and no status for adversaries taken captive in the exported NIAC.⁷⁵⁰

[...] this kind of distinction would be acceptable for combatants as, in the case of an intra-State conflict, the members of armed groups do not benefit from the privilege granted to soldiers taking part in international armed conflicts. This solution would allow account to be taken of both the internal (nature of the parties to the conflict) and international (extraterritoriality) aspects of those armed conflicts.⁷⁵¹

Thus, the exportation of the NIAC does not change the nature of the conflict per se and there are no consequences for the IHL applicable within the Colombian territory. IHL of NIAC applies in Colombia, as well as in Ecuador, during confrontations between the Colombian government and the FARC.

7.1.3 Defining the US intervention in Colombia

Since the beginning of the Colombian armed conflict, the US has been collaborating militarily with Colombia. In 1999, the US and Colombia strengthened their military collaboration with Plan Colombia, which represented a paradigm shift.⁷⁵² During the 1990s, the US treated the fight against drugs as mainly a police problem and provided aid to the police for counter-narcotic efforts;⁷⁵³ however, since 2001, this help has been provided directly to the Colombian military.⁷⁵⁴ In addition to this militarization, the cooperation has also been privatized—the US Departments of State and Defense have contracted PMSCs to carry out activities under Plan Colombia,⁷⁵⁵ including providing logistics support for reconnaissance airplanes⁷⁵⁶ and maintaining an intelligence database.⁷⁵⁷ “By 2003, U.S. involvement in Colombia encompassed 40 U.S. agencies and 4,500 people, including contractors, all working out of the

⁷⁵⁰ R. S. Schöndorf, *supra* note 748, at 45-48.

⁷⁵¹ S. Vité, *supra* note 727, at 89.

⁷⁵² Plan Colombia, *supra* note 712.

⁷⁵³ N. M. Serafino, *supra* note 712.

⁷⁵⁴ See for instance the funding for purchase of helicopters for the Colombian armed forces and national police, in N. M. Serafino *Ibid.*, table 5.

⁷⁵⁵ See 2010 Report to Congress, *supra* note 676; and 2007 Report to Congress, *supra* note 676.

⁷⁵⁶ 2010 Report to Congress, *Ibid.*

⁷⁵⁷ 2007 Report to Congress *supra* note 676.

U.S. Embassy in Bogota.”⁷⁵⁸

There are two ways of analyzing the US’ participation in Colombia: as an internationalization of the Colombian NIAC or as a parallel armed conflict between the US and Colombian armed groups.

“An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power.”⁷⁵⁹ The internationalization of a NIAC would mean the transformation of a NIAC into an IAC.⁷⁶⁰ This can occur through the intervention in a NIAC of one or more third states or, some argue, of multinational forces.⁷⁶¹ However, because an IAC in the Geneva Conventions is an armed conflict between at least two states, the only way to internationalize a NIAC is when the third state directly participates in the hostilities and is supporting an armed group against the territorial state.⁷⁶² In Colombia, the US is supporting the Colombian government, not any armed group; thus, the NIAC is not internationalized.⁷⁶³

The second option to analyze the US intervention in Colombia is to consider that there is a second armed conflict—between the US and Colombian armed groups—which is conceivable because the ICJ has accepted a fragmented application of IHL in the case concerning Military and Paramilitary Activities in and against Nicaragua.⁷⁶⁴ In this case, the Court considered two

⁷⁵⁸ D. Priest, ‘Covert Action in Colombia’, *Washington Post* (December 21, 2013), available at <http://www.washingtonpost.com/sf/investigative/2013/12/21/covert-action-in-colombia/>.

⁷⁵⁹ H. P. Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon’, 33 *The American University Law Review* (1983), at 145.

⁷⁶⁰ I. Detter, *The Law of War*, (Cambridge: Cambridge University Press, 2000), at 49; See also E. David, *supra* note 302, at 151 and 175.

⁷⁶¹ E. David, *Ibid.*

⁷⁶² *Prosecutor v Tadić*, *supra* note 295, § 84: “It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”

⁷⁶³ However, “some observers suggest [...] [that] [...] the law of international armed conflict to be applicable in every case in which a foreign Power takes action on behalf of one or other of the parties.” In I. Detter, *supra* note 760, at 49. See also E. David, *supra* note 760, at 151 and 175. In that case, the US participation in Colombia would mean that the Colombian armed conflict should be an internationalized if the US participated directly in the hostilities.

⁷⁶⁴ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ (27 June 1986), Judgment.

different conflicts: one between the Nicaraguan government and the contras, and another between the former and the US government.⁷⁶⁵

As discussed above, to establish the existence of an armed conflict, it is necessary to consider the intensity of the conflict and the organization of the parties.⁷⁶⁶ In this instance, the opposing parties in an armed conflict would be the Colombian armed groups and the US, and the intensity element depends on the involvement of the US in the fight against the FARC and ELN. However, the US intervention in Colombia has been privatized, which complicates the definition of its intervention.

PMSCs' activities can be understood as reflecting the involvement of a third state to the conflict if two conditions are met: if contractors actually take part in hostilities *and* if they are acting as agents of the foreign state when they are assisting one of the parties to the conflict.⁷⁶⁷ In theory, US PMSCs should not participate in hostilities in Colombia because the US Congress prohibited all activities that involve direct participation in the armed conflict.⁷⁶⁸ However, despite this *de jure* prohibition on such participation, some US PMSCs—DynCorp, for example—*de facto* have participated in the Colombian conflict.

The US State Department contracted DynCorp to fumigate illegal cultivation of coca plants, and during DynCorp's fumigation operations, two or three combat helicopters accompanied the planes that drop the glyphosate.⁷⁶⁹ The helicopters "have a mixed crew composed of both contractors and members of the National Police,"⁷⁷⁰ all of whom are armed and ready to fire

⁷⁶⁵ *Ibid.*, § 219.

⁷⁶⁶ See: *Prosecutor v Tadić*, *supra* note 728, § 562.

⁷⁶⁷ E. David, *supra* note 760, at 162.

⁷⁶⁸ The US Law limits the outsourcing of the inherently governmental functions; combat is part of these functions. See OMB Circular No. A-76: Performance of Commercial Activities, Revised 2003 (Circular A-76) (White House Office of Management and Budget, Washington, DC, May 29, 2003), available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction. See also a detailed study on US Law in K. A. Huskey and S. M. Sullivan, *The American Way: Private Military Contractors & U.S. Law After 9/11*, in PRIV-WAR National Reports Series (03/10).

⁷⁶⁹ U.S. General Accounting Office (GAO), Drug Control: U.S. Nonmilitary Assistance to Colombia is Beginning to Show Intended Results, but Programs Are Not Readily Sustainable (Report to the Honorable Charles E. Grassley, Chairman, Caucus on International Narcotics Control, U.S. S.), GAO-04-726, 9 (2004), available at <http://justf.org/files/primarydocs/040803gao1.pdf> [hereinafter 2004 GAO Report: Drug Control].

⁷⁷⁰ 'Mercenarios', *Semana* (August 13, 2001), available at <http://www.semana.com/nacion/mercenarios/18937-3.aspx>. Author's translation.

on the aggressors because aircraft attacks are frequent. DynCorp's fumigation contract started in 2000, and between 2001 and 2002, around ten aircraft attacks per month took place, increasing in 2003 to reach a peak of 73 attacks per month.⁷⁷¹ The number of attacks on fumigation planes decreased for several years; however, in 2013, several serious attacks forced the US and Colombia to stop the fumigation for a time.⁷⁷² DynCorp manages its own fumigation operations but the legal restrictions on contractors' participation in the conflict mean that the Colombian National Police are responsible for managing and overseeing the helicopter gunship portion of the fumigation operation.⁷⁷³ However, this oversight does not guarantee that contractors are not participating in the conflict, and it appears that the contractors retain decision-making power regarding the use of force.⁷⁷⁴ Thus, the presence of DynCorp contractors in these helicopters and their participation in repelling attacks should be considered direct participation in the Colombian armed conflict.

The second condition to classify the US intervention in Colombia as a parallel armed conflict is whether or not the activities of US PMSCs in Colombia can be attributed to the US. As discussed in Chapter Four, the current state of general international law on the topic allows acts committed by a non-state actor to be attributed to a state only if there is a very close relationship, beyond mere supervision, between the state and the non-state actor.⁷⁷⁵ Translated to the context of PMSCs in Colombia, acts committed by US-contracted PMSCs in the Colombian conflict can only be attributed to the US government if there is a very close relationship, beyond mere supervision, between the PMSCs and the US government; or, to use the same language of the ICJ, if the PMSCs act in "complete dependence" on the sending state.⁷⁷⁶

In the case of PMSCs acting in Colombia, the "very close relationship" between the US and

⁷⁷¹ 2004 GAO Report: Drug Control, *supra* note 769, at 1.

⁷⁷² A. Bermúdez Liévano, 'Dos meses sin fumigación de coca', *La Silla Vacía* (December 15, 2013), available at <http://lasillavacia.com/historia/dos-meses-sin-fumigacion-de-coca-4632>. See also C. Kraul, 'Anti-coca spraying halted in Colombia after 2 U.S. pilots shot down', *Los Angeles Times* (December 16, 2013), available at <http://articles.latimes.com/2013/dec/16/world/la-fg-colombia-us-planes-20131217>.

⁷⁷³ Mercenarios, *supra* note 770.

⁷⁷⁴ Interviews with PMSCs' employees, Bogota, September 2008.

⁷⁷⁵ See Chapter Four on states responsibility, at 55-59.

⁷⁷⁶ *Case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 297, § 392.

the US PMSCs working in Colombia is lacking. The US Embassy is in charge of supervising US contracts in Colombia.⁷⁷⁷ However, “the US Embassy, which is supposed to be in charge of the follow up of all the contracts, does not effectively oversee DynCorp’s activities. The PMSC is in charge of hiring the employees, and providing the necessary equipment - the US government is interested only in outcomes.”⁷⁷⁸ A report on “contracting oversight” by the United States Senate Committee on Homeland Security and Governmental Affairs similarly concluded that the “State Department, which has awarded over \$1 billion in counternarcotics contracts in Latin America to one company, DynCorp, has conducted sporadic oversight of that company.”⁷⁷⁹ In this case, DynCorp’s activities under its contract for fumigation cannot be considered to be under the exclusive authority of the US. Although the US Embassy is supposed to monitor all contracts performed under Plan Colombia, it appears only to be interested in the results of the contracted-for services and activities, not the process of fulfilling the contracts.⁷⁸⁰

As a result of the US government’s relative lack of involvement with US PMSCs in Colombia, the actions of DynCorp—and, likely, of any US PMSC working under Plan Colombia—cannot be attributed to the US government. Thus, there is not a parallel armed conflict ongoing between the US, waged by US PMSCs, against Colombian armed groups.

Notwithstanding the United States’ support for the Colombian government in its fight against several armed groups, the US’ activities do not internationalize the Colombian NIAC because they lend their efforts for, rather than against, the Colombian state. Moreover, there is no parallel armed conflict between the US and Colombian armed groups. Even though US PMSCs *do*, in some cases, participate in the hostilities, inadequate supervision on the part of the US makes it impossible to conclude that the PMSCs’ acts are attributable to the US and that the US is taking part in the hostilities. Thus, the Colombian armed conflict remains a NIAC between the government and armed groups, in which the application of IHL is limited

⁷⁷⁷ Report on “contracting oversight” by United States Senate Committee on Homeland Security and Governmental Affairs, in Majority Staff Committee Report, at 11.

⁷⁷⁸ Interview with employee of the US Embassy in Bogota, Bogota, May 4, 2007.

⁷⁷⁹ Majority Staff Committee Report, *supra* note 777, at 11.

⁷⁸⁰ Interview with employee of the US Embassy in Bogota, *supra* note 778.

to Common Article 3 of the Geneva Conventions and Additional Protocol II.⁷⁸¹

7.2 Regulating PMSCs' activities in Colombia

The situation of violence in Colombia is a favorable ground for the security business. A large number of private companies, domestic and multinational, offer security services in Colombia to a variety of clients, both public and private.⁷⁸² Between 1994 and 2007, their share of private security services in Colombia grew 360%.⁷⁸³ Since 2008, the state has hired PMSCs to protect at-risk individuals such as union leaders, politicians, and human rights activists.⁷⁸⁴

In general, the commercial and industrial sectors are the biggest clients in the private sector and hire PMSCs mostly for surveillance, but extractive companies are another important part of PMSCs' private sector client base.⁷⁸⁵ In recent years, extractive activities in Latin America have exploded, and Colombia is no exception.⁷⁸⁶ As part of this expansion, companies increased their activities in remote areas where extra security is needed because of guerilla

⁷⁸¹ Ratified by Colombia in 1995. Colombia has also included references to international treaty in its constitution. See Articles 93 and 94. Constitución Política de Colombia 1991, Título 2: De los derechos, las garantías y los deberes, Capítulo 4: De la protección y la aplicación de los derechos, available at <http://www.constitucioncolombia.com/titulo-2/capitulo-4>. See also A. Ramelli Arteaga, *La Constitución Colombiana y el Derecho Internacional Humanitario* (Bogotá: Universidad Externado de Colombia, 2003).

⁷⁸² Official page of the Vigilance and Private Security Superintendence, 'Dimensionamiento nacional del sector de la vigilancia y seguridad privada e impacto económico y social', Oficina asesora de Planeación, in I. Cabrera and A. Perret, 'Colombia: Regulating Private Military and Security Companies in a "host state"', in C. Bakker and M. Sossai, *supra* note 31, at 417.

⁷⁸³ Official page of the Vigilance and Private Security Superintendence, 'Dimensionamiento nacional del sector de la vigilancia y seguridad privada e impacto económico y social', Oficina asesora de Planeación, in I. Cabrera and A. Perret, *supra* note 782, at 417. In 2007, the number of domestic PMSCs employees is estimated to be 190,000, N. Florquin et al., 'A Booming Business: Private Security and Small Arms', in *Small Arms Survey, States of Security* (Cambridge: Cambridge University Press, 2011), Annex 4.1 Private security personnel in 70 countries.

⁷⁸⁴ P. Medina, *supra* note 676. The Colombian government has also hired Israeli companies to restructure the Colombian intelligence services; see 'De Tel Aviv a Tolemaida', *Semana* (August 4, 2007), available at <http://www.semana.com/nacion/articulo/de-tel-aviv-tolemaida/87449-3>.

⁷⁸⁵ Official page of the Vigilance and Private Security Superintendence, *supra* note 782, at 4.

⁷⁸⁶ See G. Bridge, 'Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform,' 56 (3) *The Professional Geographer* (2004), 406–421; A. Bebbington, 'Extractive Industries in the Andean Region: Issues, actors, challenges', *PROCASUR Regional Corporation* (July 2011); V. Henríquez, 'Investment in Latin America to Total US\$200bn this Decade', *Business News Americas* (September 28, 2010).

groups' activities.⁷⁸⁷ For a time, extractive companies sought agreements with public forces; for instance, in Colombia, a consortium of oil companies concluded a contract with the Colombian armed forces for US \$ 2 million a year, which could be paid in cash or in kind (e.g., equipment).⁷⁸⁸ However, these companies have turned to PMSCs because they offer more flexible service.⁷⁸⁹

Although the Colombian Constitution of 1991 established that the state has the monopoly over the use of force, Decree 356 of 1994 authorized the outsourcing of security functions under the supervision of the state.⁷⁹⁰ The Decree specified that the objective of private security is the reduction and prevention of threats affecting life, personal integrity, and the legitimate exercise of property rights.⁷⁹¹ It further stipulated that the activities of PMSCs must not alter or disrupt the exercise of civil rights and civil liberties.⁷⁹²

According to Decree 356, PMSCs are classified as being in the business of surveillance and private security with arms or without arms.⁷⁹³ The first type (with arms) includes surveillance and private security companies,⁷⁹⁴ security departments,⁷⁹⁵ surveillance and private security cooperatives,⁷⁹⁶ transportation of valuables,⁷⁹⁷ special surveillance services and private security, and community services for surveillance and private security.⁷⁹⁸ The second type

⁷⁸⁷ A. Perret, 'Las Compañías Militares y de Seguridad Privada en el Sector Minero-Energético: un Desafío para la aplicación de los Derechos Humanos', in A.-C. González Espinosa, (eds) *Los retos de la gobernaza minero-energética* (Bogotá: Universidad Externado de Colombia, 2013) 235-263.

⁷⁸⁸ Human Rights Watch, *Colombia: Human rights concerns raised by the security arrangements of transnational oil companies*; See also M. Jaskoski, Public Security Forces with Private Funding, Local Army Entrepreneurship in Peru and Ecuador, 47 (2) *Latin America Research Review* (2012), at 87.

⁷⁸⁹ As James Smither, Associate Director at Global Risks Advisory, said: "you can control your contractors to a certain extent, but it's much harder to control or influence the activities of state security." quoted in O. Balch, 'Mining – Slow progress on extractive human rights', *Ethical Corporation* (February 7, 2013). PMSCs are also seen to be "cost-effective [for] supplying short-term and contract-bound services." In E. Umlas et al., 'Protected but Exposed: Multinationals and Private Security', in Small Arms Survey, *States of Security supra* note 783, at 145.

⁷⁹⁰ Decreto 356 /1994

⁷⁹¹ *Ibid.*

⁷⁹² *Ibid.*

⁷⁹³ See *Ibid.*, Título II and Título III.

⁷⁹⁴ *Ibid.*, Título II Capítulo I.

⁷⁹⁵ *Ibid.*, Título II Capítulo II.

⁷⁹⁶ *Ibid.*, Título II Capítulo III.

⁷⁹⁷ *Ibid.*, Título II Capítulo IV.

⁷⁹⁸ *Ibid.*, Título II Capítulo V.

(without arms) includes surveillance and private security companies,⁷⁹⁹ companies related to security and surveillance equipment (production, installation, marketing and use),⁸⁰⁰ and companies of consultancies and investigation.⁸⁰¹ Decree 356 binds all PMSCs, regardless of type, if they are domestic or multinational, or if they are hired by a public or private entity—the only exceptions are companies contracted under Plan Colombia, which are discussed in the following section.

The Decree also provided for the creation of an entity in charge of the control of PMSCs: the *superintendencia de vigilancia y de seguridad privada* (SVSP, the superintendence of vigilance and private security).⁸⁰² This monitoring system includes duties and rights for PMSCs, with the ability to grant operating licenses for PMSCs,⁸⁰³ and impose sanctions for noncompliance.⁸⁰⁴

To obtain an operating license, a company must report specific certifications and information depending on the type of service offered. For instance, basic requirements include the location of the company, type of service offered, equipment used, insurance policy, and affiliation of their personnel to the social security system.⁸⁰⁵ The Decree also obliges companies to provide proof of employees' training or skills in order to obtain a license.⁸⁰⁶

The Colombian Congress approved a reform to the Decree in 2006.⁸⁰⁷ The aim of the reform was to facilitate the renewal of licenses, as well as extend the duties and rights related to human rights and international humanitarian law.⁸⁰⁸ In 2012, another reform simplified the paperwork for companies to obtain a license and modified rules concerning the use of

⁷⁹⁹ *Ibid.*, Título III Capítulo I.

⁸⁰⁰ *Ibid.*, Título III Capítulo II.

⁸⁰¹ *Ibid.*, Título III Capítulo III.

⁸⁰² Superintendencia de vigilancia y de seguridad privada, <http://www.supervigilancia.gov.co/index.php?>.

⁸⁰³ See Decree 356 / 1994, Art. 11 and 14.

⁸⁰⁴ Decree 356 / 1994, Art. 7.

⁸⁰⁵ Decree 356 / 1994.

⁸⁰⁶ Decree 356 / 1994, Art. 74; reaffirmed in the updated law in 2012 in Art. 103 (2) of Decree 19 / 2012.

⁸⁰⁷ Congreso de la Republica de Colombia, Resolucion 2852 of 2006. This action transformed the Decree into a law.

⁸⁰⁸ The new duties of the PMSC in terms of human rights and international humanitarian law are related to ensuring adequate training in these matters and the corresponding certification. The rights would be oriented to guarantee the labor rights of the employees. See Resolution No. 2852, August 8, 2006, Unifying Private Security and Monitoring Regime. See also: Resolution 5349 December 6, 2007; Resolution 4745 December 27, 2006.

firearms.⁸⁰⁹ The companies are now required to be in charge of the weapons, which cannot be the property of employees.⁸¹⁰

Despite some positive features, both in the original Decree and the reforms, there remain serious deficiencies. The Decree does not contemplate the export and import of military and security services.⁸¹¹ There is no requirement that PMSC personnel attend a human rights training, no oversight of the type of personnel hired, and no controls over the type of actors that are permitted to use PMSCs.⁸¹² Finally, the law lacks provisions articulating PMSCs' accountability to public society.⁸¹³

While the law has lacunae and could be improved, the main problem with the control of domestic PMSCs in Colombia is the law's implementation. As reported by several PMSCs' managers, the SVSP lacks real capacity to control any PMSCs' activities.⁸¹⁴ Nevertheless, the content and, mainly, the fact that there is an entity in charge of the monitoring are positive aspects of the Colombian national law on private security.

Unfortunately, the Colombian law is ineffective in the face of PMSCs working under Plan Colombia. Employees of such PMSCs enjoy the same status as US military personnel—and the accompanying immunity from prosecution—which has led to impunity in several cases of violations of human rights by PMSCs.

7.2.1 PMSCs working under Plan Colombia: immunity and impunity

As discussed above, a range of PMSCs, domestic and international, operate in Colombia, providing services to a range of clients. However, most of the multinational PMSCs working

⁸⁰⁹ Decree 19 / 2012.

⁸¹⁰ *Ibid.*

⁸¹¹ There is no mention of potential exportation of service abroad.

⁸¹² I. Cabrera and A. Perret, *supra* note 782, at 417.

⁸¹³ Comments made by the Academic Network on the Use of Mercenaries—Colombia chapter to the second commission of Congress of the Republic about the current law and the new proposal. The lack of requirement for PMSC personnel to attend a human rights training is particularly relevant when PMSCs are working in contra-insurgency or anti-drug operations.

⁸¹⁴ Interviews of PMSCs' employees, conduct in Bogota in June and August 2008, and in August 2011.

in Colombia are contracted by the public sector—not by the Colombian government, but by the United States under the framework of Plan Colombia.⁸¹⁵ They provide security services such as technological, training, and reconnaissance services.⁸¹⁶ Following a history of immunity for US military personnel working in Colombia, the Plan Colombia agreement includes immunity for contractors. This immunity and the fact that companies are contracted directly by the US government—they do not need to register in Colombia—place multinational PMSCs working under Plan Colombia out of Colombian control.

US PMSCs working under Plan Colombia have been hired by US Departments of State and Defense to carry out activities related to US military and police aid to Colombia.⁸¹⁷ For example, in 2000, Military Professional Resources Incorporated (MPRI) helped restructure the Colombian armed forces to aid in their fight against drugs,⁸¹⁸ and DynCorp, as described above, has been in charge of the fumigation of coca plants since 2000. The latter was also tasked with training, air transport, aircraft maintenance, reconnaissance, and search and rescue operations.⁸¹⁹ Northrop Grumman had a reconnaissance program contract to fly over the Colombian jungle with aircraft equipped with infrared cameras in order to track illegal activities related to drugs or guerrilla movements.⁸²⁰ The PMSCs Virginia Electronic Systems, Inc. and Air Park Sales and Service, Inc. delivered and installed communication equipment for the navy's air forces in 2002.⁸²¹ In 2006, Chenega Federal Systems was in charge of an intelligence database.⁸²² In 2009, Telford Aviation provided logistics support for reconnaissance airplanes,⁸²³ while ARINC, Inc. was in charge of training activities, maintenance, and logistical support related to the Colombian Air Bridge Denial program—an anti-narcotic program operated by the US Central Intelligence Agency.⁸²⁴ All US contractors are granted the same immunity protection that US military personnel working in Colombia

⁸¹⁵ 2007 Report to Congress, *supra* note 676; 2010 Report to Congress *supra* note 676. See also A. Perret, *Las Compañías Militares y/o de Seguridad Privadas en Colombia: ¿Una nueva forma de mercenarismo?*, *supra* note 32.

⁸¹⁶ 2007 Report to Congress, *supra* note 676; 2010 Report to Congress *supra* note 676.

⁸¹⁷ *Ibid.*

⁸¹⁸ 'La guerra privatizada', *Semana* (10 November 2002).

⁸¹⁹ DynCorp-State Department Contract (2001), available at <http://www.corpwatch.org>.

⁸²⁰ J. Forero, 'Private US Operatives on Risky Missions in Colombia', *New York Times* (February 4 2004).

⁸²¹ *El Tiempo* (June 20 2003).

⁸²² 2007 Report to Congress, *supra* note 676.

⁸²³ 2010 Report to Congress, *supra* note 676.

⁸²⁴ *Ibid.*

have benefitted from for more than sixty years.

The immunity of US military staff in Colombia comes from agreements signed after the Second World War.⁸²⁵ The most important of these agreements is the General Agreement for Economic, Technical and Related Assistance between the Government of Colombia and the Government of the United States of America, which was signed in Bogota on July 23, 1962.⁸²⁶

This agreement represented the first step towards the immunity of US personnel in Colombia. Article III states:

The Government of Colombia will receive a special mission and personnel to carry out the duties of the Government of the US according to the present Agreement and will consider the personnel of this special mission as part of the Diplomatic Mission of the Government of the US in Colombia, with the purpose to concede them the privileges and immunities that are granted to this mission and to personnel of equal rank.⁸²⁷

This agreement has been extended several times since it was signed; for instance, through Articles 5 and 11 of the Agreement of Military Mission of 1974.⁸²⁸ In 2003, a bilateral agreement on the non-extradition of US personnel to the International Criminal Court expanded this immunity.⁸²⁹

This immunity limits the possibility for Colombian authorities to control PMSCs. There are numerous allegations of human rights violations at the hands of PMSCs operating under Plan Colombia, but none of these violations has been brought to justice. In 2004, US contractors

⁸²⁵ See for instance Mutual Defense Assistance, United States of America and of the Republic of Colombia, *signed at Bogota, April 17, 1952* available at <http://forusa.org/sites/default/files/uploads/us-colombia-agreements-1952-y-1974.doc>.

⁸²⁶ General Agreement for Economic, Technical and Related Assistance Between the Government of United States of America and the Government of Colombia (1962).

⁸²⁷ *Ibid.*, Art. 3.

⁸²⁸ Agreement between the Government of the United States of America and the Government of the Republic of Colombia concerning an Army Mission, a Naval Mission and an Air Forces Mission of the United States or America Armed Forces in the Republic of Colombia (1974).

⁸²⁹ See Article 1 of the “acuerdo entre el gobierno de la Republica de Colombia y el Gobierno de los Estados Unidos de America respeto a la entrega de personas de las Estados Unidos de America a la Corte Penal International” available at http://www.presidencia.gov.co/prensa_new/sne/2003/septiembre/18/08182003.htm.

from the Colombian base Tolemaida recorded a pornographic movie with minors.⁸³⁰ No investigation took place and the contractors responsible were never punished.⁸³¹ In August 2007, an American soldier and a PMSC contractor, also working at Tolemaida base, raped a twelve-year-old girl.⁸³² The Colombian judicial system opened an investigation, but there is a very high probability that the perpetrators will not be brought to justice because of the immunity.⁸³³

So long as this grant of immunity is observed, the only possibility for prosecuting the offenders rests in the US. The United States has two useful mechanisms for exercising jurisdiction over contractor crimes: US federal civilian courts and the court-martial jurisdiction of US military courts.⁸³⁴

US federal courts do not have jurisdiction over acts occurring beyond national borders, absent an explicit statutory provision to the contrary. There are two statutes or statutory provisions that may provide federal courts jurisdiction over many activities involving PMSCs.⁸³⁵ Special Maritime Territorial Jurisdiction (SMTJ) enables federal courts to exercise their jurisdiction over acts perpetrated on US military bases, regardless of the identity of the perpetrator.⁸³⁶ In the same vein, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S.A. PATRIOT Act)⁸³⁷ expands SMTJ jurisdiction to military bases located abroad, with respect to offenses committed by or

⁸³⁰ Contractors have been accused of drug trafficking, rape, and collaboration with paramilitaries. See for instance ‘Mercenarios’, *supra* note 770; K. Penhaul, Americans blamed in Colombia raid, *San Francisco Chronicle* (June 15, 2001), available at <http://www.sfgate.com/news/article/Americans-blamed-in-Colombia-raid-2910509.php>; interview with Diana Murcia, Lawyer at Colectivo de Abogados José Alvear Restrepo, Bogota, April 19, 2007.

⁸³¹ “Investigan a dos militares de E.U. por violación de niña de 12 años en Comando Aéreo de Melgar”, *supra* note 618.

⁸³² *Ibid.*

⁸³³ Interview with Diana Murcia, *supra* note 830.

⁸³⁴ K. A. Huskey and S. M. Sullivan, ‘United States: Law and Policy Governing Private Military Contractors after 9/11’, in C. Bakker and M. Sossai, *supra* note 31, at 359.

⁸³⁵ See *Ibid.*

⁸³⁶ See 18 US Code §7, in K. A. Huskey and S. M. Sullivan, ‘The American Way: Private Military Contractors & US Law after 9/11’ *supra* note 768.

⁸³⁷ US Congress, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/html/PLAW-107publ56.htm>.

against a national of the United States.⁸³⁸ However, these laws cannot be used by in the aforementioned cases, because the acts occurred on the Colombian military base where the US PMSC personnel stay for their work.⁸³⁹

The other possible alternative for jurisdiction by US federal courts is under the Military Extraterritorial Jurisdiction Act (MEJA).⁸⁴⁰ The MEJA “extends federal court jurisdiction over civilians overseas who commit criminal offenses where domestic prosecution in that foreign nation was not feasible.”⁸⁴¹ In 2004, the MEJA was amended to extend to contractors working for agencies other than the Department of Defense.⁸⁴² MEJA provides jurisdiction for individuals “employed by or accompanying the Armed Forces outside the United States,” which include civilian employees, contractors and subcontractors.⁸⁴³ However, “the statute may not necessarily cover a significant portion of contractors who engage in personal security of employees (or companies) unassociated with the Department of Defense” (e.g., State Department or private reconstruction firms).⁸⁴⁴

In the case of the twelve-year-old girl raped by a US contractor, there is no information available on which US department was contracting the perpetrator and Colombian authorities did not properly investigate the facts.⁸⁴⁵ According to the available information, there have been no real efforts made to investigate the allegations and there is not enough information to know if it would be possible to use these US laws.

⁸³⁸ See 8 US Code §1101(22), in K. A. Huskey and S. M. Sullivan, ‘The American Way: Private Military Contractors & US Law after 9/11’ *supra* note 768.

⁸³⁹ “Investigan a dos militares de E.U. por violación de niña de 12 años en Comando Aéreo de Melgar”, *supra* note 618.

⁸⁴⁰ Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub L No 106-523 114 Stat 2488 (codified at 18 USC, paras 3261–67 (2000)) as amended by the Ronald W Reagan National Defense Authorization Act for FY 2005, Pub L No 108-375 & 1088 118 Stat 2066 (2004).

⁸⁴¹ K. A. Huskey and S. M. Sullivan, ‘The American Way: Private Military Contractors & US Law after 9/11’ *supra* note 768, at 24,

⁸⁴² Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub L No 106-523 114 Stat 2488 (codified at 18 USC, paras 3261–67 (2000)) as amended by the Ronald W Reagan National Defense Authorization Act for FY 2005, Pub L No 108-375 & 1088 118 Stat 2066 (2004).

⁸⁴³ 18 US Code, §§ 3261–67. In K. A. Huskey and S. M. Sullivan, ‘The American Way: Private Military Contractors & US Law after 9/11’ *supra* note 768.

⁸⁴⁴ K. A. Huskey and S. M. Sullivan, ‘United States: Law and Policy Governing Private Military Contractors after 9/11’, *supra* note 834, at 356.

⁸⁴⁵ See ‘Investigan a dos militares de E.U. por violación de niña de 12 años en Comando Aéreo de Melgar’, *supra* note 618.

The incidents mentioned above suggest that Colombia is fulfilling neither its obligations to prevent violations of human rights nor its obligations to investigate and prosecute all such violations. The situation also raises the question about the US' responsibility to supervise PMSCs it has contracted. As discussed in Chapter Three, contracting states⁸⁴⁶ and territorial states⁸⁴⁷ are subject to a due diligence obligation under human rights law to prevent PMSCs' employees "from having sexual relations with children or committing violent or sexually exploitative acts against women" within their jurisdiction.⁸⁴⁸ The territorial state has a similar due diligence obligation under IHL: the obligation "to control PMSCs engaged in activities that could threaten the civilian population, especially women and children" and "to minimize the risk that off-duty contractors (or off duty soldiers) might engage in unlawful sexual activities with women or children."⁸⁴⁹

DynCorp's activities in Colombia also illustrate the lack of control over US PMSCs working in Colombia and its problematic consequences for human rights. As mentioned above, the US Department of State contracted DynCorp to fumigate illegal crops of coca plants in Colombia.⁸⁵⁰ The fumigation appears to have been completed too close to the border, or perhaps even crossed the border, affecting Ecuador.⁸⁵¹ At least two legal cases arose from this activity. First, in 2001 a class action lawsuit was filed in the United States against DynCorp; however, the claim was dismissed in February 2013 on grounds of insufficient evidence and the plaintiffs said they would appeal the verdict.⁸⁵² Then, in 2008, Ecuador filed suit against Colombia at the International Court of Justice, arguing "Colombia has violated its obligations under international law by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment."⁸⁵³ In

⁸⁴⁶ H. Tonkin, *supra* note 262, at 218.

⁸⁴⁷ *Ibid.*, at 158.

⁸⁴⁸ *Ibid.*, at 218.

⁸⁴⁹ *Ibid.*, at 138.

⁸⁵⁰ 2007 Report to Congress, *supra* note 676; 2010 Report to Congress *supra* note 676.

⁸⁵¹ The government of Ecuador has demanded that the Colombian government carry out aerial spraying at a 10-kilometer distance from its border with Ecuador.

⁸⁵² Business and Human Rights Resources, *Case profile: DynCorp lawsuit (re Colombia & Ecuador)*, accessed October 28, 2013 available at <http://business-humanrights.org/en/dyncorp-lawsuit-re-colombia-ecuador>. See also DynCorp's strategic Defense in Drug Crop Spraying Suit, *Bloomberg Law* (May 14, 2013).

⁸⁵³ *Case of Aerial Herbicide Spraying (Ecuador v. Colombia)*, ICJ (May 30, 2008), Order.

August 2013, the governments of Colombia and Ecuador announced an agreement ending the dispute.⁸⁵⁴ The official agreement was finalized on September 13, 2013 and establishes:

inter alia, an exclusion zone, in which Colombia will not conduct aerial spraying operations, creates a Joint Commission to ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the width of the said zone; ... sets out operational parameters for Colombia's spraying programme, records the agreement of the two Governments to ongoing exchanges of information in that regard, and establishes a dispute settlement mechanism.⁸⁵⁵

Multinational PMSCs working in Colombia are not effectively regulated—neither the domestic law nor their home or contracting state, the US in this case, are controlling their activities, aside from ensuring their performance of contractual obligations. Moreover, US PMSCs' employees' immunity from Colombian jurisdiction seriously complicates the prospect of achieving justice for victims of human rights violations. Neither state involved is fulfilling its international obligations to prevent, investigate, prosecute, and remedy human rights violations.

⁸⁵⁴ See Colombia confirma acuerdo con Ecuador para terminar juicio por fumigaciones, *El Espectador* (August 25, 2013) available at <http://www.elespectador.com/noticias/politica/colombia-confirma-acuerdo-ecuador-terminar-juicio-fumig-articulo-442341>; Colombia dará US\$15 millones a Ecuador por fumigaciones, *Semana* (September 13, 2013) available at <http://www.semana.com/nacion/articulo/colombia-fumigaciones-ecuador-15-millones/357509-3>.

⁸⁵⁵ *Case of Aerial Herbicide Spraying (Ecuador v Colombia)*, ICJ (September 17, 2013), Press Release, Case removed from the Court's List at the request of the Republic of Ecuador, available at <http://www.icj-cij.org/docket/files/138/17526.pdf>. See the agreement *Case of Aerial Herbicide Spraying (Ecuador v Colombia)*, ICJ (September 13, 2013), Order, available at <http://www.icj-cij.org/docket/files/138/17528.pdf>. See also: M. Milanovic, 'Aerial Herbicide Spraying Case Dead in the Air', *Ejil: Talks!, I Blog of the European Journal of International Law* (September 17, 2013), available at <http://www.ejiltalk.org/aerial-herbicide-spraying-case-dead-in-the-air/>.

Chapter 8: Mexico

Since the Mexican government declared war on several drug trafficking organizations (DTOs) in 2006, the situation of violence in Mexico has worsened with every passing year.⁸⁵⁶ Mexican DTOs are highly organized and the level of violence has reached the point that it is possible to classify the situation as a situation of armed conflict. As in Colombia, this internal situation of violence has increased the demand for security services. Under the auspices of the bilateral (US-Mexico) Merida Initiative, domestic and multinational PMSCs are participating in security tasks for both parties to the agreement. Unlike in Colombia, there is no bilateral agreement that provides immunity to US employees working under the Merida Initiative, thus Mexican law regulates PMSCs.⁸⁵⁷ However, multinational PMSCs operating in Mexico have found a way to escape the applicable Mexican law. This chapter analyzes the situation in Mexico, the problem posed by the application of IHL to a law enforcement situation that has deteriorated into an armed conflict, and the lack of implementation of PMSCs' regulation in Mexico.

8.1 The Mexican War on Drugs: definition of the situation

Although drug traffickers have operated in Mexico for more than a half-century, drug-related violence became more visible around the 1990s, when the drug market became more lucrative and the centralized power of the Mexican government started to slip.⁸⁵⁸ Nevertheless, the Mexican government maintained a relatively passive approach to drug trafficking and related violence until the election of President Felipe Calderón in 2006.⁸⁵⁹ Shortly thereafter,

⁸⁵⁶ Human Right Watch, *Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico's "War on Drugs,"* *supra* note 623, at 4.

⁸⁵⁷ See below discussion of the Merida Initiative.

⁸⁵⁸ J. Beittel, *Mexico's Drug Trafficking Organizations: Source and Scope of the Rising Violence*, Congressional Research Service, Report for Congress (Washington, DC, April 2013), at 7.

⁸⁵⁹ On the one hand, the relationship among Mexican traffickers was cooperative during the 1980s. It can be described as a "*Pax Padrino*" or "Peace of the Godfather." In N. Jones, *The State Reaction: A Theory of Illicit Network Resilience*, (Irvine: University of California, unpublished PhD Thesis, copy on file with author, 2011). On the other, the PRI was the only party and controlled all state security departments. This allows credible long-

President Calderón declared war on organized crime.⁸⁶⁰ The US put its support behind Calderón, pledging to provide US \$1.9 billion under the Merida Initiative.⁸⁶¹ The approach implemented—a militarization of the fight against drug traffickers—has escalated the situation of violence dramatically.⁸⁶² President Enrique Peña Nieto, who took office in December 2012, has tried to modify the strategy, but has not yet succeeded.⁸⁶³ The situation of violence, in conjunction with other factors, suggests that it may be appropriate to apply IHL; however, the application of IHL to a law enforcement initiative such as this raises several concerns.⁸⁶⁴

8.1.1 History of the War on Drugs and US intervention in Mexico

The US government has battled drugs for decades. President Nixon declared the War on Drugs in 1971, naming drug abuse as “public enemy number one in the United States.”⁸⁶⁵ This declaration represented a change in rhetoric for the US, foreshadowing a change in the US’ approach to fighting drug abuse and drug trafficking.⁸⁶⁶ In 1973, he created the Drug

term reciprocal promises to traffickers because they were not subject to losing power in democratic elections. It can also be described as a “*Pax Mafiosi*” between the state and cartels. (Duran-Martinez and Snyder 2009.)

⁸⁶⁰ ‘Mexico troops sent to fight drugs’, *BBCnews* (December 12, 2006), available at <http://news.bbc.co.uk/2/hi/americas/6170981.stm>.

⁸⁶¹ US Department of State, Bureau of Public Affairs, *The Merida Initiative: Expanding the U.S./Mexico Partnership* (2011), available at www.state.gov/documents/organization/158009.pdf. [hereinafter *The Merida Initiative*]. See also C. Ribando Seelke and K. M. Finklea, *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond*, Congressional Research Service, Report for Congress (Washington, DC, June 2013).

⁸⁶² Human Right Watch, *Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico’s “War on Drugs,”* *supra* note 623, at 4.

⁸⁶³ P. Corcoran, ‘Mexico Security Under Enrique Peña Nieto, 1 Year Review’, *InSight Crime* (December 4, 2013), available at <http://www.insightcrime.org/news-analysis/mexico-security-under-enrique-pena-nieto-one-year-in>.

⁸⁶⁴ IHRL applies to law enforcement initiatives meanwhile IHL applies to armed conflict. Even though military forces are often involved in law enforcement, the principal actor in law enforcement is the police, which are civilians. The concrete difference is the regulation of the use of force: the principles of necessity, proportionality, and precaution are conceived of differently. For instance, “under the conduct of hostilities paradigm, the principle of precaution requires belligerents to take constant care to spare the civilian population, civilians and civilian objects. On the contrary, under the law enforcement paradigm, all precautions must be taken to avoid, as far as possible, the use of force as such, and not merely incidental civilian death or injury or damage to civilian objects.” In G. Gaggioli, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, ICRC Expert Meeting (November 15, 2013), available at <http://www.icrc.org/eng/resources/documents/publication/p4171.htm>.

⁸⁶⁵ ‘Thirty Years of America’s Drug War: A Chronology’, *PBS*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron>.

⁸⁶⁶ C. Ribando Seelke, L. Sun Wyler, J. S. Beittel, *Latin America and the Caribbean: Illicit Drug Trafficking and U.S. Counterdrug Programs*, Congressional Research Service, Report for Congress (Washington, DC, 2010), at 9-10.

Enforcement Administration to execute “an all-out global war on the drug menace,” and since the mid-1970s, the US government has invested billions of dollars in anti-drug assistance programs around the world.⁸⁶⁷ Initially, the focus was on source countries such as Colombia, Bolivia, and Peru, and these tougher counter-drug efforts in the Gulf of Mexico shifted drug trafficking routes to Mexico in the 1980s.⁸⁶⁸ With the intensification of the Colombian conflict during this period, as discussed above, “Mexican DTOs began to play a larger role in controlling smuggling routes into the United States. By 1991, Mexico reportedly accounted for an estimated 300–350 tons of cocaine and roughly a third of all heroin and marijuana imported into the United States.”⁸⁶⁹ Since 2000, Mexico has risen as a transit country and become a target of US anti-drug assistance programs.⁸⁷⁰

Mexico is now a major supplier of all kind of drugs—heroin, methamphetamine, marijuana, and cocaine—to the US drug market: the drug market between US and Mexico is estimated by US government reports as ranging between US \$18 and 39 billion in profits annually.⁸⁷¹ Most of this inventory flows into the US through its southern border.⁸⁷² While

profits [from illicit drugs] accrue to a wide range of actors, from poor rural farmers to affluent urban dealers [...] in many instances, the single most profitable sector of the market is the process of transporting the drugs internationally. The funds raised by trafficking groups can be used to underwrite other criminal activity and even political insurgency.⁸⁷³

⁸⁶⁷ C. Ribando Seelke, L. Sun Wyler, J. S. Beittel, *supra* note 866, 9-10. See also ‘A Brief History of The War on Drugs’, *TIME*, available at <http://content.time.com/time/world/article/0,8599,1887488,00.html#ixzz2rdTeEFUN>.

⁸⁶⁸ D. A. Shirk, *The Drug War in Mexico Confronting a Shared Threat*, Council on Foreign Relations, Special Report No. 60, March 2011; L. Astorga and D. A. Shirk, ‘Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context’, Working Paper, Wilson Center (USMEX WP 10-01) (2010).

⁸⁶⁹ D. A. Shirk, *The Drug War in Mexico Confronting a Shared Threat*, *Ibid.*, quoting J. Gerth, ‘On the Trail of the Kingpins’, *The New York Times* (1988), and M. Miller, ‘Jailed Cocaine Baron Directs Drug Trade from Cell’, *Los Angeles Times* (1991).

⁸⁷⁰ C. Ribando Seelke, L. Sun Wyler, J. S. Beittel, *supra* note 866, at 9-10.

⁸⁷¹ S. S. Whitworth, ‘The Untold Story of Mexico’s Rise and Eventual Monopoly of Methamphetamine Trade, Monterey’, California: Naval Post Graduate School, Department of National Security Affairs (2008). See also US Department of Justice, Drug Enforcement Administration, *National Drug Threat Assessment, 2013*, available at <http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf>; US Department of Justice, Drug Enforcement Administration, *National Drug Threat Assessment, 2011*, available at <http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf>.

⁸⁷² See US Department of Justice, Drug Enforcement Administration, *National Drug Threat Assessment, 2013*, *Ibid.*; and US Department of Justice, Drug Enforcement Administration, *National Drug Threat Assessment, 2011*, *Ibid.*

⁸⁷³ United Nations Office on Drugs and Crime, *World Drug Report 2007*, available at <https://www.unodc.org/unodc/en/data-and-analysis/WDR-2007.html>, at 170.

States have three sets of options to address the problem of drugs.⁸⁷⁴ First, states can legalize, medicalize, or decriminalize drugs.⁸⁷⁵ Alternatively, states can take a hard-line approach and engage in the so-called “War on Drugs.” Finally, states can “collude” with drug trafficking organizations.⁸⁷⁶ Mexico has experimented with the latter two options.⁸⁷⁷

From 1929 to 2000, the *Partido Revolucionario Institucional* (PRI, Institutional Revolutionary Party) governed Mexico.⁸⁷⁸ The consolidated rule of a single centralized ruling political party in Mexico provided the opportunity for DTOs to create a “system-wide network of corruption [that] ensured distribution rights, market access, and even official government protection for drug traffickers in exchange for lucrative bribes.”⁸⁷⁹ Until the 1980s, there were no serious efforts to dismantle DTOs.⁸⁸⁰ However, it was around this time that DTOs became a major threat to Mexican national security and “Mexican officials [...] want[ed] to break the major DTOs down into smaller pieces, transforming a national security threat to a public security problem.”⁸⁸¹

By the time President Calderón took office in 2006, drug violence was already rising.⁸⁸² Calderón made a definitive break from the PRI’s collusion with DTOs, choosing to engage in the War on Drugs and heavily militarize the intervention of the Mexican state against

⁸⁷⁴ N. Jones, *supra* note 859, at 5-6.

⁸⁷⁵ States and populations will have to accept the social costs of such option, including potential increased health costs associated with rises in addiction. The debate on legalization of drugs is complex and ongoing. The argument against this possibility can be summarized saying: “Drugs are not dangerous because they are illegal; they are illegal because they are dangerous. A child who reaches age 21 without smoking, misusing alcohol, or using illegal drugs is virtually certain to never do so. Today, most children don’t use illicit drugs, but all of them, particularly the poorest, are vulnerable to misuse and addiction. Legalization and decriminalization—policies certain to increase illegal drug availability and use among our children—hardly qualify as public health approaches.” J. A. Califano Jr, ‘Should drugs be decriminalised? No’, 335 *BMJ* (November 10, 2007), at 967. The argument in favor is: “Many people may think that taking drugs is inherently wrong and so should be illegal. But there is a question of effectiveness—does making it illegal stop people doing it? The answer is clearly no. One could even argue that legalization would eliminate part of the attraction of taking drugs—the allure of doing something illegal.” K. Chand, ‘Should drugs be decriminalised? Yes’, 335 *BMJ* (November 10, 2007), at 966.

⁸⁷⁶ The collusion between a state and a DTO is not a state policy, state are not monolithical regarding their relations with illegal actors. See Solingen 2007; Solingen 1998.

⁸⁷⁷ N. Jones, *supra* note 859.

⁸⁷⁸ On the history of the PRI and Mexican politics, see E. Krauze, *Mexico Biography of Power: A History of Modern Mexico 1810-1996* (New York: Harper Collins Publishers, 1997).

⁸⁷⁹ D. A. Shirk, *supra* note 868, at 9.

⁸⁸⁰ M. C. Toro, *Mexico’s “War” on Drugs: Causes and Consequences* (Boulder, CO: Lynne Rienner, 1995).

⁸⁸¹ D. A. Shirk, *supra* note 868, at 9.

⁸⁸² A. Rawlins, *Mexico’s Drug War*, Council on Foreign Relations (January 11, 2013), Backgrounder, available at <http://www.cfr.org/mexico/mexicos-drug-war/p13689>.

DTOs.⁸⁸³ However, the government had been left with “only weak tools to counter increasingly aggressive crime networks” because of the “political manipulation of law enforcement and judicial branches, which limited professionalization and enabled widespread corruption.”⁸⁸⁴ Calderón tried to address police corruption, long a problem in Mexico, by using military forces instead of police to carry out the War on Drugs.⁸⁸⁵ In 2006, the federal government deployed “tens of thousands of troops to man checkpoints, establish street patrols, shadow local police forces, and oversee other domestic law enforcement functions in high-drug violence states.”⁸⁸⁶

Until 2007, the US and Mexico seldom collaborated on security matters.⁸⁸⁷ During the 1980s and 1990s, “counternarcotics efforts were often marked by mistrust” between the two countries.⁸⁸⁸ Cooperation in anti-drug efforts started increasing during the administration of President Vicente Fox (2000-2006).⁸⁸⁹ In 2007, following Calderón’s lead to crack down on the cartels, the US and Mexico cemented a plan for cooperation in fighting drug trafficking and increasing security in the region.⁸⁹⁰ This plan, called the Merida Initiative: Expanding the U.S./Mexico Partnership (hereinafter the Merida Initiative), established full cooperation between the two countries, with the United States providing an anti-crime and counter-drug assistance package to Mexico that included training and equipping Mexican forces.⁸⁹¹ Since 2010, the Obama administration has implemented a strategy based on four pillars: “(1) disrupting organized criminal groups, (2) institutionalizing the rule of law, (3) building a 21st

⁸⁸³ ‘Mexico troops sent to fight drugs’, *BBCnews* (December 12, 2006), available at <http://news.bbc.co.uk/2/hi/americas/6170981.stm>. Some have speculated regarding a sort of collusion between President Calderón and the Sinaloa Federation. See P. Radden Keefe, ‘Cocaine Incorporated’, *New York Times* (June 15, 2012).

⁸⁸⁴ S. O’Neil, ‘Mexico-U.S. Relations: What’s Next?’, *America’s Quarterly* available at <http://www.americasquarterly.org/node/1505>.

⁸⁸⁵ Guillermo Valdés, former director of the Centro de Inteligencia y Seguridad Nacional (National Center for Intelligence and Security Center, Cisen) said in an interview that the military option was the only option available to fight against DTOs in Mexico. See the interview: On police corruption see C. W. Cook, *Mexico’s Drug Cartels*, Congressional Research Service, Report for Congress (Washington, DC, 2007), at 10.

⁸⁸⁶ D. A. Shirk, *supra* note 868, at 10.

⁸⁸⁷ C. Ribando Seelke, *Mexico: Issues for Congress*, Congressional Research Service, Report for Congress (Washington, DC, 2012), at 14.

⁸⁸⁸ *Ibid.*, at 17.

⁸⁸⁹ *Ibid.*, at 14.

⁸⁹⁰ *The Merida Initiative*, *supra* note 861.

⁸⁹¹ C. Ribando Seelke, *Mexico: Issues for Congress*, *supra* note 887, at 14.

century border, and (4) building strong and resilient communities.”⁸⁹² However, neither the Mexican strategy nor the US’s support have had a pacifying effect on the situation of violence.

Instead of stabilizing and deescalating the situation, the intervention of the military forces in Mexico has caused the situation to further deteriorate, with an increase in fatalities and frequency of episodes of violence.⁸⁹³ The “government counted nearly 35,000 deaths related to organized crime from December 2006 to the end of 2010, with the number of killings increasing dramatically with each passing year, from 2,826 in 2007 to 15,273 in 2010.”⁸⁹⁴ In 2012, the number of deaths from drug violence—including the use of high-caliber automatic weapons, torture, dismemberment, and explicit messages involving organized-crime groups—reported was estimated to be between 9,577 and 12,390 for the year.⁸⁹⁵

At the beginning of the militarization of the War on Drugs in Mexico, DTOs were defending themselves against the state’s forces, killing more than 3,000 soldiers and police officers between 2006 and 2010.⁸⁹⁶ Since 2010, the nature of the violence started to change, with DTOs becoming increasingly bold in their violence.⁸⁹⁷ DTOs’ attacks targeted politicians, killing or disappearing them “presumably because they refused to cooperate with cartels,” and massacres of civilians became more common.⁸⁹⁸ Violence within and between DTOs also rose:

As the DTOs have fractured and more organizations vie for control of trafficking routes, the level of inter- and intra-cartel violence has spiked. Inter-DTO violence is used when the cartels fight one another to dominate trafficking routes. Besides inter-DTO violence (between the

⁸⁹² *Ibid.*

⁸⁹³ J. S. Beittel, *supra* note 858.

⁸⁹⁴ Human Right Watch, *Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico’s “War on Drugs,”* *supra* note 623, at 4.

⁸⁹⁵ The Mexican newspaper *Reforma* put the figure at 9,577 organized-crime-style homicides in 2012, while *Milenio* reported 12,390 for the year. In C. Molzahn, O. Rodríguez, and D. A. Shirk, ‘Drug Violence in Mexico Data and Analysis Through 2012’, available at <http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf>.

⁸⁹⁶ I. Grillo, *El Narco: Reporting On The Front Lines Of Mexico's Drug War*, (New York: St Martins Press, 2011).

⁸⁹⁷ D. Tovrov, ‘Mexico's President Calderon to Keep Fighting Drug War’, *International Business Times* (December 5, 2011), available at <http://www.ibtimes.com/mexicos-president-calderon-keep-fighting-drug-war-378914>.

⁸⁹⁸ See a list at ‘Factbox: Worst atrocities in Mexico's drug war’, *Reuters*, available at <http://www.reuters.com/article/2011/11/24/us-mexico-drugs-idUSTRE7AN1C420111124>.

different organizations), there has been widespread violence within the organizations, as factions battle in succession struggles to replace fallen or arrested leaders.⁸⁹⁹

This rise in violence has been noticeably geographically concentrated: “[t]wo-thirds of drug-related homicides occur[ed] in just five of the thirty-two Mexican states and roughly 80 percent in just 168 of the 2,456 municipalities.”⁹⁰⁰ Even so, the military intervention has also, as in Colombia, had the effect of spreading the violence within the country and beyond Mexico’s borders.⁹⁰¹ Furthermore, the violence has started to spill into neighboring countries in Central America,⁹⁰² as well as the United States.⁹⁰³

The strategy of militarization of the War on Drugs in Mexico has been severely criticized due to resulting human rights abuses.⁹⁰⁴ Since the Mexican government declared war on organized crime in 2006, documented human rights violations have increased substantially.⁹⁰⁵ Human Rights Watch (HRW) found “credible evidence of torture in more than 170 cases across the five states surveyed”⁹⁰⁶ and “documented 39 ‘disappearances’ where evidence strongly suggests the participation of security forces.”⁹⁰⁷ As part of the same investigation, HRW also found “credible evidence in 24 cases that security forces committed extrajudicial killings.”⁹⁰⁸ HRW concluded that “rather than strengthening public security in Mexico, Calderón’s ‘war’ has exacerbated a climate of violence, lawlessness, and fear in many parts of the country.”⁹⁰⁹

The violence caused by the War on Drugs is compounded by the impunity perpetuated by Mexico’s highly corrupt judicial system:⁹¹⁰ “even when public officials are arrested for

⁸⁹⁹ J. S. Beittel, *supra* note 858.

⁹⁰⁰ D. A. Shirk, *supra* note 868, at 8.

⁹⁰¹ L. Astorga and D. A. Shirk, *supra* note 868.

⁹⁰² See T. Galen Carpenter, ‘Drug Mayhem Moves South’, *The National Interest* (January 4, 2012), available at <http://nationalinterest.org/article/drug-mayhem-moves-south-6279>.

⁹⁰³ Texas’ request for National Guard protection from Mexican drug crime, in Time, ‘A Brief History of The War on Drugs’, available at <http://content.time.com/time/world/article/0,8599,1887488,00.html#ixzz2rdTeEFUN>.

⁹⁰⁴ See for instance, Count the Cost, *The War on Drugs: Undermining Human Rights*, available at http://www.countthecosts.org/sites/default/files/Human_rights_briefing.pdf.

⁹⁰⁵ Human Right Watch, *Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico’s “War on Drugs,”* *supra* note 623, at 5.

⁹⁰⁶ *Ibid.*, at 5.

⁹⁰⁷ *Ibid.*, at 6.

⁹⁰⁸ *Ibid.*, at 7.

⁹⁰⁹ *Ibid.*, at 5.

⁹¹⁰ D. A. Shirk, *supra* note 868, at 8.

working with a cartel, they are rarely convicted.”⁹¹¹ As a result, Mexican citizens do not trust the justice system and do not report an estimated of three-quarters of crimes.⁹¹² Many reported crimes are not investigated because of institutional weaknesses, and the result is that criminal impunity prevails.⁹¹³ When investigation occurs, the use of torture and forced confessions mean that as many as eighty-five percent of crime suspects arrested are found guilty.⁹¹⁴ In 2008, the Mexican Congress passed judicial reforms, and Mexico has until 2016 “to move from a closed door process based on written arguments to a public trial system with oral arguments and the presumption of innocence.”⁹¹⁵ The objective is to make the entire process more transparent.⁹¹⁶

Despite the change of administration in 2012 and the new president’s promises to change the strategy against DTOs, the militarization of the War on Drugs remains the strategy implemented in Mexico.⁹¹⁷ In contrast to Calderón’s exclusive focus on using military forces, President Peña Nieto created a civilian-military hybrid *gendarmerie* to lead the War on Drugs.⁹¹⁸ This change notwithstanding, the strategy on the ground remains the same, and the military forces are still in charge “including in the exact places where Calderon famously sent them at the beginning of his administration.”⁹¹⁹ “Perhaps the most striking difference between Calderon and Peña Nieto is in the amount of focus the government places on highlighting its

⁹¹¹ A. Rawlins, *supra* note 882.

⁹¹² D. A. Shirk, *supra* note 868, at 8, quoting: Instituto Ciudadano de Estudios Sobre la Inseguridad (ICESI), www.icesi.org.mx.

⁹¹³ *Ibid.*, at 8. See also G. Zepeda Lecuona, *Crimen sin castigo: Procuración de justicia penal y ministerio público en México* (Mexico City: Centro de Investigación Para el Desarrollo, A.C. Fondo de Cultura Económica, 2004).

⁹¹⁴ R. Hernández Forcada and M. E. Lugo Garfías, *Algunas notas sobre la tortura en México* (Mexico City: Comisión Nacional de los Derechos Humanos, 2004), at 139; International Rehabilitation Council for Torture Victims (IRCT), *Country Assessment Report: Mexico* (Copenhagen: International Rehabilitation Council for Torture Victims, 2006), at 8.

⁹¹⁵ C. Ribando Seelke, *Mérida Initiative for Mexico and Central America: Funding and Policy Issues*, Congressional Research Service, Report for Congress (Washington, DC, 2010), at 22.

⁹¹⁶ C. Ribando Seelke, *Supporting Criminal Justice System Reform in Mexico: The U.S. Role*, Congressional Research Service, Report for Congress (Washington, DC, 2013), at 4.

⁹¹⁷ P. Corcoran, ‘What Mexico’s Elections Mean for Crime Policy: Part I’, *InSight Crime* (June 25, 2012), available at <http://www.insightcrime.org/news-analysis/what-mexicos-elections-mean-for-crime-policy-part-i>; P. Corcoran, ‘What Mexico’s Elections Mean for Crime Policy: Part II’, *InSight Crime* (June 26, 2012), available at <http://www.insightcrime.org/news-analysis/what-mexicos-elections-mean-for-crime-policy-part-ii>.

⁹¹⁸ M. Kane, ‘Peña Nieto Discusses Proposed Security Force’, *InSight Crime* (July 3, 2012), available at <http://www.insightcrime.org/news-briefs/pena-nieto-discusses-proposed-security-force>.

⁹¹⁹ P. Corcoran, ‘Mexico Security Under Enrique Peña Nieto, 1 Year Review’, *InSight Crime* (December 4, 2013), available at <http://www.insightcrime.org/news-analysis/mexico-security-under-enrique-pena-nieto-one-year-in>.

efforts. Throughout the Calderon administration, public security was the foremost issue of public interest.”⁹²⁰

The militarization of the War on Drugs in Mexico and the intensity of violence raise the question of the classification of the situation. International lawyers have started to classify the situation as an armed conflict—a NIAC—which would mean that IHL applies in Mexico.⁹²¹ However, IHL was not created to apply to law enforcement initiatives such as the War on Drugs.

8.1.2 Defining the situation and the actors in Mexico

As discussed in the Colombian case, the classification of the situation—as an armed conflict, situation of internal tensions, or peace—determines whether or not IHL applies. In Mexico, the prolonged duration of violence indicates that is not a situation of peace, while the fact that there are not two states fighting each other makes apparent that there is no IAC. As such, the first consideration to determine whether or not IHL applies is to determine whether the situation is one of internal tensions or of NIAC.⁹²² This legal classification has important practical consequences, in particular as regards the rules to be observed in the use of force.⁹²³ If a situation is considered a NIAC, IHL must govern the conduct of hostilities, and both governmental forces and their opposition parties to the NIAC are bound by it.⁹²⁴ Meanwhile, in situations of internal tensions, only IHRL applies and the “all precautions must be taken to avoid, as far as possible, the use of force.”⁹²⁵

⁹²⁰ *Ibid.*

⁹²¹ See for instance, S. Casey-Maslen, (eds), *The War Report 2012* (Oxford: Oxford University Press, 2013), at 4.

⁹²² As Additional Protocol II Article 1 § 2 states: “[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” in Protocol Additional II, *supra* note 340, Art. 1 § 2.

⁹²³ G. Gaggioli, *supra* note 864.

⁹²⁴ It is also important to note that “many rules previously applicable in international armed conflicts are now binding as a matter of customary law in non-international armed conflicts as well” including the principle of distinction, the prohibition of indiscriminate attacks, and the duty to take precautions in attack. in ICRC, IHL and the Challenges of Contemporary Armed Conflicts, Report of the 28th International Conference of the Red Cross and the Red Crescent (December 2-6, 2003), at 4.

⁹²⁵ G. Gaggioli, *supra* note 864.

As mentioned above, and following international jurisprudence, the criteria to determine if a situation is one of internal tensions or of armed conflict are the intensity of the conflict and organization of the parties.⁹²⁶ The preceding chapter explained that the intensity of the conflict can be analyzed through, among others, the duration of the conflict, the frequency of the acts of violence and military operations.⁹²⁷ The organization of the parties can be analyzed considering the existence of a chain of command of at least one armed group.⁹²⁸

As discussed above, Mexico has endured drug-related violence consistently since 2006 until the present. Since this violence started, drug-related violent deaths exceed an estimated 10,000 per year.⁹²⁹ [See appendix II] Military forces have been deployed on a large scale.⁹³⁰ Furthermore, violence in Mexico has been ongoing for more than seven years, which leaves no doubt that the duration requirement is met.⁹³¹ All of these factors suggest that the Mexican situation satisfies the requirement of intensity necessary to differentiate an armed conflict from a situation of internal tensions.

The second condition for determining if a situation is an armed conflict, rather than internal tensions, is the level of organization of the groups active in the situation. The two main elements for evaluating the level of organization of an armed group are if the group has a structure of command and, for the application of the Additional Protocol II, if the group has the capacity to control a delimited territory.⁹³² Even if several groups are active in a given situation, it is sufficient to classify the situation as an armed conflict even if only one group has the necessary level of organization.

The structure of command of Mexican DTOs is sufficiently developed to control the drug

⁹²⁶ See *Prosecutor v Tadić*, *supra* note 728, § 562. See also *Prosecutor v Limaj*, *supra* note 729.

⁹²⁷ See for instance: S. Vité, *supra* note 727. See Chapter 7 on Colombia.

⁹²⁸ *Ibid.*, at 70.

⁹²⁹ As mentioned in *supra* note 895, the Mexican newspaper *Reforma* put the figure at 9,577 organized-crime-style homicides in 2012, while *Milenio* reported 12,390 for the year. In C. Molzahn, O. Rodríguez, and D. A. Shirk, *supra* note 895.

⁹³⁰ I. Grillo, *supra* note 896.

⁹³¹ The Inter-American Commission of Human Rights has characterized at thirty-hour long confrontation as armed conflict. *Case of Juan Carlos Abella v Argentina*, IACoMHR (October 30, 1999), Case No 11.137 Report No 55/97.

⁹³² Protocol Additional II, *supra* note 340, Art. 1.

supply chain between the producing countries in South America—Colombia, Peru, and Bolivia—and the main market in the north—the US. Initially, they were small, “family-based organizations that depended on corrupt state security forces to provide protection from prosecution and security from rivals.”⁹³³ However, this changed when DTOs expanded into distribution.⁹³⁴ Today, some of them possess “extensive paramilitary and counterintelligence capabilities.”⁹³⁵

In fact, some of the most successful have “shifted from a hierarchical, personality-driven leadership that dominated the Pablo Escobar-type ‘cartels’ in the 1980s and 1990s to a networked and more fluid organizational structure that is more resilient in the face of law enforcement pressure.”⁹³⁶ As part of this transformation, cartels have adopted the terminology and logic of the military.⁹³⁷ “The organizations began designating ‘lieutenants’ to create ‘cells,’ which included various parts responsible for intelligence gathering and enforcement.”⁹³⁸ They received military training, sometimes by foreign experts.⁹³⁹ Cartels have also constituted private armies for their protection, sometimes composed by former soldiers.⁹⁴⁰

The development of the military side of these organizations is significant for two main reasons. In addition to increasing DTOs’ trafficking capacity, these quasi-military cells have also started to act similarly to insurgents, attacking the state. Several Mexican DTOs have adopted this new model of operation, the two most important being *Los Zetas* and the Sinaloa cartel, sometimes called the Sinaloa Federation.”⁹⁴¹

⁹³³ S. Dudley, ‘Mexico: From Family Businesses to Small Armies’, *InSight Crime* (November 26, 2012), available at <http://www.insightcrime.org/violence-against-migrants/part-i-the-emergence-of-mexicos-small-armies>.

⁹³⁴ *Ibid.*

⁹³⁵ C. Ribando Seelke, L. Sun Wyler, J. S. Beittel, *supra* note 866, at 3.

⁹³⁶ *Ibid.*, at 4.

⁹³⁷ See S. Dudley, *supra* note 933.

⁹³⁸ *Ibid.*

⁹³⁹ According to Dudley, regarding an interview with a law enforcement officer: “one of the trainers for the Tijuana Cartel was called ‘El Iraquí’ for his Middle Eastern origins. Other trainers came from the Mexican military and police circles, according to a former Tijuana Cartel operative.” In S. Dudley, *Ibid.*

⁹⁴⁰ Los Zetas and the Sinaloa Federation “are estimated to have fielded over 100,000 foot soldiers.” In R. J. Bunker, ‘Strategic threat: narcos and narcotics overview’, 21 (1) *Small Wars & Insurgencies* (2010) 8-29.

⁹⁴¹ M. Beith, ‘The Current State of Mexico’s Many Drug Cartels’, *CTC Sentinel* (September 24, 2013), available at <http://www.ctc.usma.edu/posts/the-current-state-of-mexicos-many-drug-cartels>.

The Sinaloa Federation is often described as the largest and most powerful drug trafficking organization in Mexico.⁹⁴² It was built through a process of partnerships, alliances, and inter-marriages among the leaders' families.⁹⁴³ Unlike *Los Zetas* and other DTOs, the Sinaloa Federation concentrates solely on drug trafficking and not on smaller enterprises such as extortion.⁹⁴⁴ It is well known for its innovativeness in pursuit of its goals, such as building tunnels under the US-Mexico border or using catapults to send drugs over the border fence there.⁹⁴⁵ The Sinaloa Federation's military activities are not comparable to *Los Zetas'* activities: although the Sinaloa Federation "is responsible for a great deal of carnage," its "approach to killing has traditionally been more discreet."⁹⁴⁶ The leitmotif is "[y]ou need to use violence frequently enough that the threat is believable. But overuse it, and it's bad for business."⁹⁴⁷ However, since *Los Zetas* started to compete for some of the Sinaloa Federation's territories, even directly attacking its members, the Federation answered by beginning, in 2005 and 2006, to develop armed enforcer groups.⁹⁴⁸ These affiliated armed groups have been used to carry out paramilitary-style operations;⁹⁴⁹ for instance, they were involved in the two-year battle for control of Ciudad Juarez that killed more than 5,000 people.⁹⁵⁰ The violence used by the Sinaloa Federation is more targeted against other DTOs than against the state or the population, and its main purpose has been to (keep) control on territories for its drug trafficking activities.⁹⁵¹

⁹⁴² InSight Crime, *Sinaloa Cartel Profile*, available at <http://www.insightcrime.org/groups-mexico/sinaloa-cartel-sinaloa>.

⁹⁴³ P. Radden Keefe, *supra* note 883.

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Ibid.*

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Ibid.* The Sinaloa Federation has used violence and targeted *Los Zetas* "dump[ing] a collection of dismembered bodies in Zeta territory." *Ibid.*

⁹⁴⁸ Wilson Center, *Sinaloa OCG/Organización del Pacífico* [sic], available at <http://www.wilsoncenter.org/sinaloa-ocgorganizaci%C3%B3n-del-pacifico>.

⁹⁴⁹ *Ibid.*

⁹⁵⁰ A. A. Caldwell and M. Stevenson, 'Sinaloa Takes Over Ciudad Juarez', *The Huffington Post*, available at http://www.huffingtonpost.com/2010/04/09/sinaloa-takes-over-ciudad-juarez_n_531378.html.

⁹⁵¹ As explained by Malcolm Beith, "There is a level-headedness about the [Sinaloa] leadership that the other groups lack. To the authorities, first priority always has to be quelling violence. When other groups throw grenades into a crowd of innocents or behead[s] people, it's obvious what needs to be done. Sinaloa has perpetrated its share of violence, but by and large it did not cause disruption to the general well-being of the population." In J. Albert-Hootsen, 'How the Sinaloa Cartel Won Mexico's Drug War', *Global Post* (February 28, 2013), available at <http://www.globalpost.com/dispatch/news/regions/americas/mexico/130227/sinaloa-cartel-mexico-drug-war-US-global-economy-conflict-zones>.

In terms of organization, the Sinaloa Federation is bigger and more inter- or trans-national than *Los Zetas*.⁹⁵² It is based in the state of Sinaloa in northwestern Mexico and has operatives in at least seventeen Mexican states.⁹⁵³ Joaquín Guzmán—commonly known as *El Chapo*, or *El Chapo Guzmán*—is the “C.E.O.” of the Sinaloa Federation, which operates in numerous countries, such as Panama,⁹⁵⁴ El Salvador,⁹⁵⁵ Colombia,⁹⁵⁶ the US,⁹⁵⁷ and Australia.⁹⁵⁸ It is now expanding its activities into Asia.⁹⁵⁹ Under the supervision of *El Chapo*, the organization works as a federation of smaller groups, in which individual groups “run their operations like franchises.”⁹⁶⁰ “The organizational structure of the cartel also seems fashioned to protect the leadership. No one knows how many people work for Sinaloa.”⁹⁶¹ Thus, it is not clear if the Sinaloa Federation fulfills the requirement of organization of an armed group. On the one hand, the organization is comparable to a multinational enterprise with “cells” around the world, which implies a great capacity of communication.⁹⁶² On the other hand, different independent groups compose the Sinaloa Federation, which means that even though they receive orders from the same boss, the chain of command is flexible and depends on each group within the Federation.

⁹⁵² S. Logan, ‘Tracking the Sinaloa Federation’s International Presence’, *InSight Crime* (April 30, 2013), available at <http://www.insightcrime.org/news-analysis/tracking-the-sinaloa-federations-international-presence>. See for instance below the activities of the Sinaloa Federation all around the world.

⁹⁵³ M. Beith, *supra* note 941.

⁹⁵⁴ See M. Cawley, ‘4 of Mexico’s Cartels Operate in Panama: Officials’, *InSight Crime* (September 17, 2013), available at <http://www.insightcrime.org/news-briefs/four-mexican-cartels-operate-in-panama-officials>.

⁹⁵⁵ See H. Silva, ‘UN Confirms Links Between El Salvador’s Perrones and Pacific Cartel’, *InSight Crime* (August 14, 2013), available at <http://www.insightcrime.org/news-analysis/unodc-study-confirms-links-between-perrones-and-pacific-cartel>.

⁹⁵⁶ See for instance M. Cawley, ‘Colombia Seizes FARC Cocaine Destined for Sinaloa Cartel: Army’, *InSight Crime* (August 18, 2013), available at <http://www.insightcrime.org/news-briefs/colombian-authorities-seize-farc-cocaine-destined-for-sinaloa-cartel>. See also M. Cawley, ‘Sinaloa Cartel May Have Presence in Southwest Colombia: Santos’, *InSight Crime* (February 15, 2013), available at <http://www.insightcrime.org/news-briefs/sinaloa-cartel-presence-colombia-santos>.

⁹⁵⁷ The presence of the Sinaloa Federation in US includes cells in Arizona, California, Texas, Chicago, and New York. See C. W. Cook, *supra* note 885, at 1-12.

⁹⁵⁸ P. Radden Keefe, *supra* note 883. See also E. Pachico, Court Docs Describe Sinaloa Cartel Expansion in Australia’, *InSight Crime* (February 11, 2013), available at <http://www.insightcrime.org/news-briefs/court-docs-describe-sinaloa-cartel-expansion-in-australia>.

⁹⁵⁹ J. Bargent, ‘Is Sinaloa Cartel Making a Play for Asia’s Lucrative Drug Market?’, *InSight Crime* (January 27, 2014), available at <http://www.insightcrime.org/news-briefs/assassination-warnings-shows-sinaloa-cartels-presence-in-philippines>.

⁹⁶⁰ M. Beith, *supra* note 941.

⁹⁶¹ P. Radden Keefe, *supra* note 883.

⁹⁶² *Ibid.*

The recent capture of *El Chapo* on February 21, 2014 illustrates this lack of chain of command and the fact that the Sinaloa Federation works more like a business than an armed group.⁹⁶³ The succession process of a leader's group depends on the way the group is structured.⁹⁶⁴ The Sinaloa Federation "headquarters" do not get involved in the leadership of its partners, and other groups members of the federation do not affect—and are unaffected by—the succession process.⁹⁶⁵ "[W]hat affects the cartel 'headquarters' does not necessarily affect the 'subsidiaries' because there is no fragmentation on the edges when there is turnover at the top."⁹⁶⁶ This lack of chain of command makes the Sinaloa Federation not comparable to an organized armed group.

Los Zetas initially formed in the late 1990s as an armed group for the protection of the Gulf Cartel (*Cartel del Golfo*).⁹⁶⁷ As former members of the Mexican special operations forces, they had excellent military training and sophisticated skills and now, as *Los Zetas*, "[t]heir core strengths include well-honed intelligence capabilities, exploiting grassroots networks, precision small-unit attacks, ambushes and raids, and symbolic violence and brutality."⁹⁶⁸ They wear uniforms and have camps where they train and store their artillery.⁹⁶⁹ *Los Zetas* have organized urban blockades known as *narcobloqueos*: "on August 14, 2010, members of los Zetas blocked off at least 13 major roads in Monterrey, preventing access to the city's international airport and major highways entering and exiting the northern industrial city."⁹⁷⁰ While they have access to military artillery, including rockets, grenade launchers, and assault

⁹⁶³ R. C. Archibold and G. Thomson, 'Most-Wanted Drug Lord is Captured in Mexico', *New York Times* (February 22, 2014).

⁹⁶⁴ D.C. Martínez-Amador and S. Dudley, 'Sinaloa Cartel Succession in Mexico: More Political Intrigue than Violence', *InSight Crime* (February 27, 2014), available at <http://www.insightcrime.org/news-analysis/sinaloa-cartel-succession-in-mexico-more-political-intrigue-than-violence>.

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Ibid.*

⁹⁶⁷ C. W. Cook, *supra* note 885, at 10.

⁹⁶⁸ M. G. Manwaring, *A "New" Dynamic in the Western Hemisphere Security Environment: The Mexican Zetas and Other Private Armies* (Carlisle Barracks: Strategic Studies institute, September 2009).

⁹⁶⁹ In May 12, 2010, during a raid by Mexican forces on a *Los Zetas* camp in Higuera, the Mexican forces "found grenade launchers, grenades, 50-caliber machine guns, and AR type rifles, as well as uniforms and SUVs marked with Zetas insignia." In J. P. Sullivan and S. Logan, 'Los Zetas: Massacres, Assassinations and Infantry Tactics in The Counter Terrorist', *Counter Terrorist* (November 2010), at 2. See also S. Logan, 'Los Zetas: Evolution of a Criminal Organization', *International Relation Security Network* (March 2011).

⁹⁷⁰ J. P. Sullivan and S. Logan, *Ibid.*, at 2.

rifles,⁹⁷¹ mostly coming from the United States,⁹⁷² they have also developed their own new weaponry such as *narcotanques*, improvised infantry-fighting vehicles.⁹⁷³ Several massive attacks are attributed to *Los Zetas*; for example, a “grenade attack in Morelia that killed eight and wounded more than 100” in September 2008.⁹⁷⁴ They have also launched coordinated military actions against public forces—on July 23, 2013, six separate attacks on police left fifteen officers injured, as well as the two dead.⁹⁷⁵ “They remain one of the few criminal groups in the Americas willing to deliberately take head on a military checkpoint or patrol,”⁹⁷⁶ which means that their military actions more closely resemble those of an insurgent group than a criminal group.

Although *Los Zetas*’ military capacity and activities are more similar than the Sinaloa Federation’s to a traditional armed group, their structure is different.⁹⁷⁷ Many armed groups—the FARC in Colombia, for instance—have a strongly hierarchical structure.⁹⁷⁸ By contrast, *Los Zetas* look like a “global business organization that can quickly, flexibly, and effectively respond to virtually any opportunity, challenge, or changing situation.”⁹⁷⁹ Despite being somewhat non-traditional, this flexibility does not mean that *Los Zetas* are less organized than other groups and the group’s command structure is well known.⁹⁸⁰ Thus, *Los Zetas* are

⁹⁷¹ *Los Zetas* have been found to have access to firearms including AK-47s and its variant, known as the *cuerno de chivo*, as well as modified AR-15s and M-16s. In J. P. Sullivan and S. Logan, *Ibid.*, at 2.

⁹⁷² “Both the Bush and Obama Administrations have acknowledged the US responsibility to stop the flow of guns into Mexico from the United States. 90% of guns in Mexico recovered in crimes that are traced are traced back to the United States. Guns are purchased through straw- buyers and modified by illegal gunsmiths in the US or Mexico before or after being trafficked into Mexico.” In N. Jones, *supra* note 859, at 160.

⁹⁷³ J. P. Sullivan, *From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America. Implications for Global Security*, FMSH-WP-2012-09, April 2012, at 5, available at http://halshs.archives-ouvertes.fr/docs/00/69/40/83/PDF/FMSH-WP-2012-09_Sullivan.pdf.

⁹⁷⁴ G. W. Grayson, ‘Los Zetas and other Mexican Cartels Target Military Personnel’, *E-Notes, Foreign Policy Research Institute* (March 2009) available at <http://www.fpri.org/enotes>. See also D. E. Osorno, ‘Masacre en Coahuila, venganza de los Zetas’, *La Vanguardia* (February 21, 2014), available at <http://www.vanguardia.com.mx/masacreencoahuilavenganzadeloszetas-1952221.html>.

⁹⁷⁵ ‘Saldo de 22 muertos en emboscadas contra PF’, *El Universal*, <http://www.eluniversal.com.mx/estados/2013/impreso/saldo-de-22-muertos-en-emboscadas-contra-pf-91788.html>.

⁹⁷⁶ J. P. Sullivan and S. Logan, *supra* note 969, at 2.

⁹⁷⁷ M. G. Manwaring, *A Contemporary Challenge to State Sovereignty: Gang and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil* (Carlisle Barracks: Strategic Studies institute, 2007), at 1-2.

⁹⁷⁸ See Chapter 7 on Colombia.

⁹⁷⁹ M. G. Manwaring, *supra* note 977, at 1-2.

⁹⁸⁰ STRATFOR, *Mexican Drug Cartels: Two Wars and a Look Southward*, Cartel Report 5 (2009), copy on file with author. See also E. Salcedo-Albarán and L. J. Garay Salamanca, *Structure of a Transnational Criminal*

sufficiently organized to be considered an armed group.

Given the intensity of the violence and the high level of organization of, at a minimum, *Los Zetas*, the situation in Mexico meets the requirements to be considered a NIAC. Considering this classification, Common Article 3 should apply. However, the application of Protocol Additional II is still in question. Its application is required if at least one armed group controls part of the territory of the high contracting party of the Protocol.⁹⁸¹ At least two armed groups seem to control—or have controlled, in the past—parts of the Mexican territory in some way.⁹⁸² Both organizations—*Los Zetas* and the Arellano-Félix Organization (*Tijuana Cartel*), which was affiliated to the Sinaloa Federation—pursued for a time a strategy of controlling territory for profit.⁹⁸³

Taking control of part of the Mexican territory started with a strategy of corruption; “[c]orrupt security forces once had a hand in this part of the business, but over time, the criminal groups usurped that control.”⁹⁸⁴ The objective of this strategy was to control a territory in which illicit traffic occurs: DTOs’ activities typically include extortion, kidnapping, and taxing the local population within the controlled territory.⁹⁸⁵ In addition to terrorizing the local population, DTOs’ infiltration of the state made it possible for them to promulgate their own rule of law.⁹⁸⁶ In certain cases they somewhat supplanted the state, “building community solidarity

Network: “*Los Zetas*” and the Smuggling of Hydrocarbons, Vortex Working Paper n°12, available at <http://www.scivortex.org/12TCNsMexUsV2.pdf>; P. Corcoran, ‘Identifying, Battling Key Agents in Mexico Gang Structures’, *InSight Crime* (June 30, 2014), available at <http://www.insightcrime.org/news-analysis/identifying-key-agents-in-mexico-gang-structures>.

⁹⁸¹ Protocol Additional II, *supra* note 340.

⁹⁸² See N. Jones, *supra* note 859; See also Dudley, S., and V. Rios, V., ‘Why Mexico's Zetas Expanded Faster than their Rivals’, *InSight Crime* (April 21, 2013).

⁹⁸³ N. Jones, *supra* note 859. The Arellano-Félix Organization (*Tijuana Cartel*) was once considered one of the most powerful Mexican DTOs. See J. Blancornelas, *El Cártel: Los Arellano Félix, La Mafia Más Poderosa En La Historia de América Latina* (Mexico DF: Grijalbo Mondadori, 2002); D. Shirk, ‘Drug Violence in Mexico: Data and Analysis from 2001-2009’, (2010), available at http://justiceinmexico.files.wordpress.com/2010/04/drug_violence.pdf.

⁹⁸⁴ S. Dudley, *supra* note 933.

⁹⁸⁵ On Arellano-Félix Organization activities: N. Jones, *supra* note 859, at 117. On *los Zetas* activities: S. Dudley and V. Rios, *supra* note 982. See also S. Dudley, ‘How the Zetas Took Monterrey’, *InSight Crime* (December 16, 2012), available at <http://www.insightcrime.org/zetas-monterrey/how-the-zetas-took-monterrey>.

⁹⁸⁶ *Armed Non-State Actors: Current Trends & Future Challenges*, DCAF Horizon 2015 Working Paper No. 5 (2012), Geneva Center for the Democratic Control of Armed Forces, available at http://www.dcaf.ch/content/download/53925/812465/file/ANSA_Final.pdf at 18; A. Winton, ‘Urban Violence: A Guide to the Literature’, 16 *Env’t & Urbanization* (2004) 165, at 170, available at

through employment opportunities, by building infrastructure and by providing goods and services to the community.”⁹⁸⁷

For these DTOs, taking control of territory was not a military strategy, as it might be for a classical insurgent; however, the results were comparable. In the end, an illegal armed group controlled part of the territory, challenging and even replacing the state. Thus, at least in some parts of the country, Additional Protocol II should apply, or have applied, in addition to Common Article 3.

The conclusion that the situation of violence in Mexico is technically an armed conflict and IHL should apply in part of the country may, however, raise some opposition. IHL was created to regulate armed conflict between two or more parties, not law enforcement initiatives. An over-application of IHL is not always positive because it typically occurs at the expense of the application of IHRL. This is potentially detrimental because in certain cases, human rights law can offer better protection against use of force and deprivation of freedom.⁹⁸⁸

8.1.3 Application of IHL in a law enforcement initiative

In Mexico, the drug-related violence and presence of well-organized armed groups suggest that the situation displays characteristics similar to those of an armed conflict. However, the implications of classifying Mexico as armed conflict are contrary to the goals of IHL to protect civilians in an armed conflict. One of the purposes of IHL is to protect civilians from the effects of war, such as combatants’ abuses of power, but in Mexico, IHL is not the best protection for a population that is suffering the collateral effects of the state’s fight against drug traffickers. This raises several questions about the existing standard for classifying a situation as an armed conflict.

The classification of a situation of violence as an armed conflict has several consequences. On

<http://eau.sagepub.com/content/16/2/165>.

⁹⁸⁷ *Armed Non-State Actors: Current Trends & Future Challenges*, *Ibid.*

⁹⁸⁸ M. Sassòli, ‘The Role of Human Rights and International Humanitarian Law in New Types of Armed’ Conflicts, in O. Ben-Naftali, (ed), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011) at 19.

the one hand, the population is more likely to have access to international resources, such as UN Security Council interventions or even the deployment of UN peacekeeping operations. But on the other hand, the application of IHL limits, under certain circumstances, protections for civilians. In an armed conflict, civilians' rights—and lives—are often simply the price to pay for the survival of the state as it fights to retain control.⁹⁸⁹ In Mexico, the government started a law enforcement initiative to fight DTOs—the protection of the state was hardly an issue, as this initiative was not in parallel to or even intersecting an armed conflict. However, as a result of DTOs' change of goals and tactics and the government's militarization of its law enforcement initiative, the War on Drugs meets the legal requirements to be considered armed conflict. Yet the idea that IHL should apply to such a situation that is, at its core, a law enforcement initiative, raises questions about whether the existing standards to classify a situation as armed conflict—the two conditions used by the ICTY—are sufficient. Are there other existing standards? And if not, are there other options?

Several scholars argue that to consider a situation an armed conflict, the parties of the armed conflict must have a political motivation. They argue that crime groups and gangs cannot be compared to insurgent groups because, unlike insurgent groups, crime groups and gangs do not have political motivation or do not intend or attempt to take over the state.⁹⁹⁰ But the element of political motivation—an inherently subjective consideration—should not be a criterion of law, which strives to be objective.

Even if it were possible to objectively determine what constitutes a political motivation, selling and trafficking drugs can be politically motivated—for example, to finance insurgent

⁹⁸⁹ “Under the conduct of hostilities paradigm, the military necessity to use force against legitimate targets is presumed. In other words, the presumption is that combatants/fighters can be attacked with lawful means while civilians are protected against direct attack, unless and for such time as they take a direct part in hostilities.” However, under the principle of proportionality, “IHL prohibits an attack against a legitimate target if this attack “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” In other words, the IHL principle of proportionality protects only surrounding civilians and civilian objects from damage which would be excessive in relation to the concrete and direct military advantage anticipated of an attack.” In G. Gaggioli, *supra* note 864.

⁹⁹⁰ See for instance C. Bruderlein, *The Role of Non-state Actors in Building Human Security: The case of Armed Groups in Intra-state Wars*, Centre for Humanitarian Dialogue, (2000), available at <http://hdcentre.org/files/the%20role%20of%20non-state%20actors.pdf>. See also D. Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy (2000), available at http://ichrp.org/files/reports/6/105_report_en.pdf.

fights, to provide access to an illicit product to drug addicts, or to promote drug legalization.⁹⁹¹ Indeed several modern DTOs, as well as more traditional drug traffickers, have political motivation. Pablo Escobar—probably the most well-known Colombian drug trafficker—had a political agenda which included changing the Colombian constitution to outlaw extradition.⁹⁹² He also offered to pay all Colombian social programs with drug profits, if Colombia would legalize cocaine.⁹⁹³ In Mexico, the situation is different in the sense that DTOs do not have a clear political agenda; however, the “interpenetration of criminal and political worlds makes it difficult to distinguish between criminal and political actors.”⁹⁹⁴ *Los Zetas*, for instance, have been involved in targeting and killing politicians⁹⁹⁵ and it is not clear if these activities were to promote policy changes, further economic goals, exact revenge, or some other motivation.

Another complicating factor is that “armed actors may use illicit economic activity to fund military operations or to expand their power, for example by increasing their control over territory”⁹⁹⁶ while “highly structured groups, such as gangs and organized criminal organizations, often employ violence in pursuit of profit and economic gain, or as a mechanism for resolving disputes.”⁹⁹⁷ A mix of the two is also possible and differentiating between the two scenarios is often subject to a political evaluation. In Colombia a significant minority, including former President Uribe, denied that there was an armed conflict ongoing in the country and referred to groups such as the FARC as crime groups.⁹⁹⁸ However, as mentioned above, “legal classifications depend upon facts themselves and not upon the views on the facts of those subject to the law,”⁹⁹⁹ and a group’s political motivations are not an objective criterion of law.

⁹⁹¹ For instance, the FARC is involved in drug trafficking to finance their fight (see Chapter 7 on Colombia).

⁹⁹² See for instance: R. Escobar, *Escobar* (London: Hodder & Stoughton, 2009).

⁹⁹³ M. Bowden, *Killing Pablo: The Hunt for the World’s Greatest Outlaw* (New York: Penguin Books, 2001).

⁹⁹⁴ A. Carpentier, ‘Civilian Protection in Mexico & Guatemala: Humanitarian Engagement with Druglords & Gangs’, 6 (2) *The Homeland Security Review* (Summer 2012).

⁹⁹⁵ P. Corcoran, ‘Killing of Mexico Mayors Shows Political Aims of Organized Crime’, *InSight Crime* (July 9, 2014), available at <http://www.insightcrime.org/news-analysis/killing-mexico-mayors-political-aims-organized-crime>.

⁹⁹⁶ A. A. del Frate and L. De Martino, ‘Non Conflict Armed Violence’, in Small Arms Survey, *Everyday Dangers* (Cambridge: Cambridge University Press, 2013), at 9; See also J. Hazen, ‘Gangs, Groups, and Guns: An Overview’, in Small Arms Survey, *Gangs, Groups, and Guns* (Cambridge: Cambridge University Press, 2010), at 85–99.

⁹⁹⁷ A. A. del Frate and L. De Martino, *ibid.*

⁹⁹⁸ R. Nieto Navia, *supra* note 725, at 139.

⁹⁹⁹ M. Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’, *supra* note 726, at 75.

Other elements to consider in classifying a situation as armed conflict can be found in the *travaux préparatoires* of Common Article 3. The *travaux préparatoires* of Common Article 3 indicate that “the intended scope of applicability for Common Article 3 was far narrower than that which is currently the case.”¹⁰⁰⁰ In the Commentary on the first Geneva Convention, some “convenient criteria” to help to distinguish between a NIAC from a situation of internal tensions were proposed for the diplomatic discussion. The options discussed included:

1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3.
 - (a) That the de jure Government has recognized the insurgents as belligerents; or
 - (b) That it has claimed for itself the rights of a belligerent; or
 - (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
 - (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4.
 - (a) That the insurgents have an organization purporting to have the characteristics of a State.
 - (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
 - (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
 - (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.¹⁰⁰¹

The DTO *Los Zetas* meets the first option, as it is an organized military force acting within a determinate territory, and because of the members’ military background, and thus they probably possess basic knowledge of IHL. The Mexican government has resorted to using the regular military forces, which are under civil authority, against the DTOs, thus meeting

¹⁰⁰⁰ A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010), at 49.

¹⁰⁰¹ ICRC, Commentary - Art. 3. Part I: General provisions, available at <http://www.icrc.org/ihl/COM/380-600006?OpenDocument>.

options (2) and (4c). The activities of *Los Zetas* and the Arellano-Félix Organization meet the standards in (4a) and (4b), as these groups have replaced the state and control, or have controlled, the population in some parts of the country.¹⁰⁰²

It is unlikely that (4d) is met: no Mexican DTO has agreed to be bound by IHL, which raises issues of reciprocity.¹⁰⁰³ In IHL, there is an expectation of reciprocity, because the logic underlying IHL requires identifiable parties in order to establish equal rights and obligations among the different parties to an armed conflict.¹⁰⁰⁴ The fact that no DTO has agreed to be bound by IHL might be an issue at the moment of implementing IHL in Mexico. However, the duty to comply with IHL does not depend on reciprocity; thus, if IHL should apply to part of Mexican territory, the Mexican forces have the duty of applying it even without any expectation of reciprocity on the part of the DTOs.¹⁰⁰⁵ Ultimately, then, the fact that DTOs in Mexico do not meet (4d) should not be considered a substantive deviation from fulfilling the criteria.

Similarly, the Mexican situation does not meet the requirement (3d), as the dispute has not been admitted to the agenda of the Security Council or the General Assembly of the United Nations. However, it does not follow that lack of discussion at one of these international fora means that the situation is not an armed conflict; indeed, several widely-recognized armed conflicts have not been discussed at the UN because of political interests of certain countries.¹⁰⁰⁶ Finally, points (3a), (3b), and (3c) should not be considered dispositive either, because the status of belligerent is currently considered out-dated.¹⁰⁰⁷ Thus, even applying

¹⁰⁰² See discussion below on the control of territory.

¹⁰⁰³ S. Watts, 'Reciprocity and the Law of War', 50 *Harvard International Law Journal* (2009), at 365.

¹⁰⁰⁴ 'Fait et Document: Le droit international humanitaire et les défis posés par les conflits armés contemporains Extrait du Rapport préparé par le Comité International de la Croix-Rouge pour la 28e Conférence internationale de la Croix-Rouge et du Croissant-Rouge Genève, décembre 2003', 86 (853) *Revue Internationale de la Croix Rouge* (2004), at 267-268.

¹⁰⁰⁵ ICRC, 'Annual Report 2004', 4 available at <http://www.icrc.org/eng/resources/annual-report/>; T. Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', 87 *Intl Rev Red Cross* (2005), at 149.

¹⁰⁰⁶ For instance, the Colombian armed conflict has not been properly discussed in the UN Security Council; however, several UN resolutions refer to it, particularly concerning human rights issues. See a list of resolutions regarding Colombia at Office of the High Commissioner for Human Rights, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=40&su=50.

¹⁰⁰⁷ "The conflict may be formally recognized as belligerency. Recognition of belligerency indicates that the parties are entitled to exercise belligerent rights, thus accepting that the rebel group possesses sufficient

narrower standards than those used by the ICTY to the facts of Mexico, the situation in Mexico meets the requirements to be considered an armed conflict in which IHL applies.

Nevertheless, the issue of applying IHL to a law enforcement initiative remains. The question is whether or not IHL needs an update, either to elaborate more precise standards or to include a new type of warfare.

As a preliminary matter, it is highly unlikely that states would agree to change IHL. Even so, it is a useful exercise to conceptualize what a change in the law might look like, if it were achievable. Many commentators have discussed the ambiguity of the scope of Common Article 3 and often point out that this ambiguity is an obstacle to the implementation of international humanitarian law.¹⁰⁰⁸ “The failure of the drafters to define the term ‘armed conflict not of an international character’ allowed States reluctant to hinder their ability to deal with insurrection by accepting any international humanitarian obligations simply to deny the existence of armed conflict, and thus the applicability of international regulation.”¹⁰⁰⁹ States’ reluctance to acknowledge the existence of an armed conflict and the application of Common Article 3 can be explained as follows:

Given the political factors which are bound to influence these circumstances, and common Article 3’s silence as regards the party who is to determine the existence or otherwise of an armed conflict (and indeed the method by which this determination is to be made), decisions on the issue will inevitably be made by the State itself. Naturally reluctant to bind themselves to rules which could be perceived as favoring political opponents, States can therefore hide behind the lack of a definition to prevent the application of humanitarian law by denying the very existence of armed conflict.¹⁰¹⁰

Furthermore, clear rules could negatively affect a state by according an armed group “an immediate legitimacy as interlocutors and signal to the international community that a state with such groups faces severe challenges to its power.”¹⁰¹¹

international personality to support the possession of such rights and duties. [...] Today, formal recognition of belligerency has fallen into disuse.” A.Cullen, *supra* note 1000, at 58.

¹⁰⁰⁸ See for instance L. Moir, *supra* note 363, at 34; S. Vit , *supra* note 727; A. Cullen, *supra* note 1000, at 58.

¹⁰⁰⁹ L. Moir, *supra* note 363, at 34.

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ N. Bhuta, *supra* note 200, at 69.

Ultimately, however, the lack of authoritative definition or interpretation may not be a problem after all:

It is always dangerous to go into too much detail—especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it become.¹⁰¹²

Following this line of thinking, more detailed conditions to classify a NIAC would ultimately not serve a future application of IHL, as it is would never be possible to catch up with the imagination of future war. This position makes even more sense in the field of mercenaries and PMSCs, in which a too detailed definition would not permit the consideration of the phenomenon as it evolves. Thus, even if it were an option, updating IHL might not be the most efficient option.

The apparent shortcomings of the other approaches discussed reflect the reality that “the idea of a boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable.”¹⁰¹³ Considering, furthermore, that the application of IHL to a law enforcement initiative is inappropriate for the protection of the population, even if it reaches the level of an armed conflict, the solution might be to simply continue and increase the application of IHRL in armed conflict situations.¹⁰¹⁴

The application of IHRL alongside IHL in armed conflict has been accepted internationally.¹⁰¹⁵ In 1970 the United Nations General Assembly proclaimed that “[f]undamental human rights, as accepted in international law and laid down in international

¹⁰¹² J. S. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volume III (Geneva: ICRC, 1960), at 39.

¹⁰¹³ D. Kennedy, *On Law and War*, (Princeton: Princeton University Press, 2006), at 113.

¹⁰¹⁴ On the applicability of IHRL in armed conflict situation see for instance D. Schindler, ‘Le CICR et les droits de l’homme’, *Int’l Rev. of the Red Cross* (1979), 3-15; N. Lubell, ‘Challenges in applying human rights law to armed conflict’ *Int’l Rev. of the Red Cross* (2005); H.-J. Heintze, ‘On the relationship between human rights law protection and international humanitarian law’, *Int’l Rev. of the Red Cross* (2004) 789-814; L. Doswald-Beck, ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, *Int’l Rev. of the Red Cross* (2006); J. Meurant, ‘Droit humanitaire et droits de l’homme: spécificité et convergences’, *Int’l Rev. of the Red Cross*, (1993) at 93 – 98; L. Doswald-Beck and S. Vite, (1993). ‘International Humanitarian Law and Human Rights Law’, *Int’l Rev. of the Red Cross* (1993) 99 – 128; O. Ben-Naftali, *supra* note 988.

¹⁰¹⁵ *Ibid.* See also the holding of the ICJ and the IACtHR above.

instruments, continue to apply fully in situations of armed conflict.”¹⁰¹⁶ Another United Nations General Assembly resolution, on the humane treatment of prisoners of war, urged “strict compliance with the provisions of existing international instruments concerning human rights in armed conflicts.”¹⁰¹⁷ The Institute of International Law also stated that “[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless treaty otherwise provides.”¹⁰¹⁸

Similarly several international courts have already accepted the application of IHRL in armed conflict. In 1996 the ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons observed that:

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.¹⁰¹⁹

The IACtHR has likewise held that the existence of an internal armed conflict does not exonerate the state from its human rights obligations:

The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala [...] instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavorable distinctions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.¹⁰²⁰

¹⁰¹⁶ G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2675, at 76 (Dec. 9, 1970).

¹⁰¹⁷ A. Res. 2676 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2676, at 77 (Dec. 9, 1970).

¹⁰¹⁸ The Institute of International Law, The Effects of Armed Conflicts on Treaties, Session of Helsinki -1985, Fifth Commission, Rapporteur: Mr Bengt Broms, available at http://www.idi-il.org/idiE/resolutionsE/1985_hel_03_en.PDF.

¹⁰¹⁹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ (8 July 1996), Advisory Opinion, § 25. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (July 9, 2004), Advisory Opinion, at § 106-113.

¹⁰²⁰ *Case of Bámaca-Velásquez v. Guatemala*, IACtHR (November 25, 2000) Series C No. 70, §207.

The application of IHRL in armed conflicts helps avoid some of the challenges posed by the application of IHL to law enforcement initiatives that meet the requirements to be classified as an armed conflict, such as the War on Drugs in Mexico. This option has the additional advantage of better addressing the activities of non-state actors such as PMSCs. As discussed above, these actors escape regulation in a perspective of pure application of IHL because they are not considered subjects of IHL and their employees are civilians.¹⁰²¹

8.2 PMSCs' activities in Mexico and their regulation

The situation of violence in Mexico has, as in Colombia, had the effect of expanding the security market.¹⁰²² The market for domestic private security has grown exponentially: “[w]hereas in 1970, only forty registered private security companies were operating in the country, their number reached more than 1,400 companies in 2000”¹⁰²³ and more than 10,000 in 2012.¹⁰²⁴

The Mexican Constitution states in Article 21 that security is a state function;¹⁰²⁵ however, several federal laws, including the General Law of the National Public Security System, explicitly contemplate the existence of private security.¹⁰²⁶ Article 122 gives the Legislative Assembly the power to regulate private security services,¹⁰²⁷ which has led to the promulgation of federal laws that seek to regulate private security.¹⁰²⁸ *Ley Federal de Seguridad Privada* (LFSP, Federal Law on Private Security)—the hallmark piece of legislation on private security regulation in Mexico—subjects private security to public

¹⁰²¹ See Chapter Five.

¹⁰²² See A. Cuenca, I. Alvarado, and J. Torres, ‘Seguridad privada, negocio sin control’, *El Universal* (May 24, 2010), available at <http://www.eluniversal.com.mx/nacion/177912.html>. See also Small Arms Survey, *States of Security* *supra* note 783.

¹⁰²³ M. -M. Müller, ‘Private Security and the State in Latin America: The case of Mexico City’, 4 *Brazilian Pol. Sci. Rev.* (2010), 131, at 135.

¹⁰²⁴ J. A. Belmont, ‘Operan 10 mil firmas de seguridad privada fuera del marco legal’, *Milenio* (October 26, 2012), available at <http://www.milenio.com/cdb/doc/noticias2011/96a40c0d7cdd67d4dae4f7a38e280a72>.

¹⁰²⁵ Constitución Política de los Estados Unidos Mexicanos (February 5, 1917), Art. 21 states: “La seguridad pública es una función a cargo de la Federación, el Distrito Federal, los Estados y los Municipio”.

¹⁰²⁶ Ley General del Sistema Nacional de Seguridad Pública, (January 2, 2009), Art. 150 -152.

¹⁰²⁷ *Ibid.*, art. 122 c) base primera V (i).

¹⁰²⁸ See Ley Federal de Seguridad Privada (July 7, 2006).

oversight by making the Mexican states responsible for the regulation of PMSCs.¹⁰²⁹ Although the law is clear and demanding, including requiring that all employees be registered and properly trained,¹⁰³⁰ its implementation is a great failure.

The principal problem faced by Mexico is that 80% of PMSCs are not registered, despite both federal and state laws that require PMSCs to register with the *Secretaría de Seguridad Pública* (Ministry of Public Security).¹⁰³¹ The *Consejo Nacional de Seguridad Privada* (the National Private Security Council) estimates that up to ten thousand unregulated private security firms operate in the country, meaning that up to 600,000 guards fall outside the legal framework.¹⁰³² In fact, there are more PMSCs and PMSC employees working *outside* of the law than those working within its framework.¹⁰³³

Various factors contribute to the failed implementation of the LFSP including, for instance, differences between the laws in the different states and the lack of capacity of the state or federal governments.¹⁰³⁴ While these are genuine concerns and difficulties, there are two other factors that are more unique to Mexico that have also contributed to the failed implementation. The first one concerns the relatively casual relationships between PMSCs and their employees, and the second one concerns the training and the background of the employees of PMSCs working in Mexico.¹⁰³⁵

One of the reasons that the implementation of the LFSP has been unsuccessful has been Mexico-based PMSCs' low level of commitment to their employees. PMSCs in Mexico often do not provide steady work to their employees; instead, they provide short-term contracts lasting between a week and several months.¹⁰³⁶ With such short-term employment contracts,

¹⁰²⁹ *Ibid.*, art. 2 §1.

¹⁰³⁰ M.-M. Müller, *supra* note 1023, at 148.

¹⁰³¹ I. Alzaga, 'Sin permisos, 87% de empresas de seguridad', *Milenio* (April 29, 2012), available at <http://www.milenio.com/cdb/doc/noticias2011/41b7fb1f83d1281726928ecb267920bc>.

¹⁰³² J. A. Belmont, 'Operan 10 mil firmas de seguridad privada fuera del marco legal', *Milenio* (October 26, 2012), available at <http://www.milenio.com/cdb/doc/noticias2011/96a40c0d7cdd67d4dae4f7a38e280a72>.

¹⁰³³ *Ibid.*

¹⁰³⁴ Interview with Carlos Mendoza, security consultant, Mexico City, September 6, 2012.

¹⁰³⁵ *Ibid.* On relationships between PMSCs and their employees see also P. Arias, *Seguridad privada en América Latina: el lucro y los dilemas de una regulación deficitaria*, *supra* note 32, at 54 (2009).

¹⁰³⁶ Interview with anonymous, Mexico City, September 16, 2012.

PMSCs often find that it is not cost-effective to invest in their employees, notwithstanding the LFSP's requirement that PMSCs invest in human resources. In this way, the way the private security market works—with short-term demand and high turnover—often undermines the objectives of the LFSP. Despite well-intentioned regulations, most PMSCs are unregistered, staffed by untrained employees with little job security and little commitment to the company for which they work.¹⁰³⁷

Other unique challenges in Mexico include the training and background checks of PMSCs' employees. Article 27 of the LFSP forbids PMSCs from hiring anyone who was fired from a public security institution (e.g., police, military) for a serious offense, negligent endangerment, or working while intoxicated, among other violations.¹⁰³⁸ Despite this prohibition, many ex-police officers with inadequate training or criminal histories seek employment with PMSCs, and evidence indicates that such individuals have been successful in obtaining work.¹⁰³⁹ Again, the law itself is not necessarily a failure but rather its enforcement. As observed:

The lax inspections, in combination with the limited control capacities of the [Secretaría de Seguridad Pública del Distrito Federal (Secretary of Public Security for the Federal District, SSPDF)], not only contribute to the growth and consolidation of an informal private security sector, they are furthermore responsible for the predominantly reactive character of the regulatory activities. Most of the serious enforcement and inspection efforts only happen when citizens or competing security companies report infringements, or when a criminal incident involves private security forces and receives broad media coverage.¹⁰⁴⁰

The lack of enforcement of the law, especially the lack of inspections, is of great concern in the Mexican context because it provides criminal groups the opportunity to take advantage of the poorly-regulated private security market.¹⁰⁴¹ This has already occurred in other countries in the region; for example, “[c]riminal groups in Honduras are allegedly taking advantage of the proliferation of private security firms by setting up their own companies as a cover for

¹⁰³⁷ Interview with Carlos Mendoza, *supra* note 1034.

¹⁰³⁸ Ley Federal de Seguridad Privada, Art. 27, *supra* note 1028.

¹⁰³⁹ J. Medellín, ‘La seguridad privada’, in R. Benítez Manaut, A. Rodríguez Sumano and A. Rodríguez Luna (eds) *Atlas de la seguridad y la defensa de México*, (Mexico city: Colectivo de Análisis de la Seguridad con Democracia, 2009) 146, at 148.

¹⁰⁴⁰ M.-M. Müller, *supra* note 1023, at 141.

¹⁰⁴¹ Interview with Armando Luna, member of Colectivo de Análisis de la Seguridad con Democracia, Mexico City, September 13, 2012.

their illicit activities.”¹⁰⁴² Some are suspicious that this is also occurring in Mexico—that criminal groups pose as PMSCs, getting close to wealthy individuals under the guise of providing them protection, and later taking them hostage for ransom.¹⁰⁴³ The fact that “many of the private security guards are ex-police and military officers who have lost their jobs because of ‘inappropriate behavior’ ” makes the possible links with criminal groups even more concerning because the guards can use their police or military network and knowledge.¹⁰⁴⁴ “In many cases these people maintain their personal networks established inside the public security forces which serve as a perfect infrastructure for intelligence gathering and material and personnel supply for engaging in criminal activities such as kidnappings.”¹⁰⁴⁵

Although Mexican laws such as the Federal Law on Private Security contemplate and seek to address several of the challenges posed by the privatization of security in Mexico, such regulations are only adequate on paper. In real life, implementation of the laws falls short, resulting in deficient regulation of private security. Ultimately, “formal laws do little to regulate private police in a country where the regulators—i.e. the public police—themselves are corrupt.”¹⁰⁴⁶

8.2.1 The particular case of multinational PMSCs

Multinational PMSCs in Mexico provide services to two categories of clients: private and public. The private sector includes foreign, transnational, and Mexican companies, as well as wealthy individuals who contract multinational PMSCs for “kidnapping resolution and ransom negotiation services, among others, often as part of broader ‘risk management’ contracts.”¹⁰⁴⁷

¹⁰⁴² J. Bargent, 'Private Security Companies a Cover for Criminals in Honduras', *InSight Crime* (March 25, 2013), available at <http://www.insightcrime.org/news-briefs/honduras-private-security-organized-crime>.

¹⁰⁴³ Interview with anonymous, Mexico City, September 19, 2012.

¹⁰⁴⁴ M.-M. Müller, *supra* note 1023, 141.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ D. E. Davis, *Law enforcement in Mexico: Not yet under control*, 22 NACLA Report on the Americas, 2003, at 22.

¹⁰⁴⁷ N. Miroff, 'As kidnappings for ransom surge in Mexico, victims' families and employers turn to private U.S. firms instead of law enforcement', *Washington Post* (February 26, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022603384.html>.

The second main category of clients, states, is public. Multinational PMSCs operate in Mexico largely under the guise of the Merida Initiative.¹⁰⁴⁸ “The [US] Congress has appropriated \$1.5 billion since the Merida Initiative began in fiscal year 2008” to support “comprehensive justice sector reforms” including training of federal police forces.¹⁰⁴⁹ Contracts for the training of the Mexican police have been “doled out to 30 or 40 U.S. companies”; for instance, the company MPRI has trained police or military forces in Mexico in urban warfare techniques.¹⁰⁵⁰ More generally, these monies have funded maintenance, logistics, equipment, training, and support, among other items,¹⁰⁵¹ services provided mostly by PMSCs based in the US.¹⁰⁵²

PMSCs contracted under provisions of the Merida Initiative work directly either for the Mexican or United States government.¹⁰⁵³ Employees of PMSCs that work directly for the US government are considered part of the US mission in Mexico and benefit from the same treatment as other US government employees—for example, they benefit from immunity from prosecution by the Mexican government.¹⁰⁵⁴ The other PMSCs contracted under the Merida Initiative usually work for the Mexican Ministry of Public Security, and their job consists

¹⁰⁴⁸ On the Merida Initiative see R. Benítez Manaut (ed) *Crimen organizado e Iniciativa Mérida en las relaciones México-Estados Unidos* (Mexico city: Colectivo de Análisis de la Seguridad con Democracia, 2010). “At the time the agreement was signed, the Mexican Foreign Affairs Minister explained to the public that the Initiative did not provide for the presence of US troops and military consultants.” In A. Luna, ‘La iniciativa Mérida y la guerra contra las drogas. Pasado y presente’, in R. Benítez Manaut *Crimen organizado e Iniciativa Mérida en las relaciones México-Estados Unidos*, (Mexico city: Colectivo de Análisis de la Seguridad con Democracia, 2010) 31, at 44.

¹⁰⁴⁹ *The Merida Initiative*, *supra* note 861. The first part of the money approved by the US Congress was used to “buy helicopters and inspection gear.” In M. Rosenberg, ‘U.S. security firms vie for Mexican drug war work’, *Reuters* (July 16, 2009), available at <http://www.reuters.com/article/2009/07/16/idUSN16445904>.

¹⁰⁵⁰ M. Rosenberg, *Ibid.* B. Conroy, ‘U.S. Private Sector Providing Drug-War Mercenaries to Mexico’, *The Narcsphere*, (April 3, 2011), available at <http://narcosphere.narconews.com/notebook/bill-conroy/2011/04/us-private-sector-providing-drug-war-mercenaries-mexico>. “The Urban Warfare Program will train basic level soldiers on the skills needed to support counter organized crime campaigns, to understand and support law enforcement functions and processes, to operate within the civil legal framework, and to effectively interact with the Mexican society.”

¹⁰⁵¹ Phone interview with PMSC employee, Guatemala City, June 12, 2012.

¹⁰⁵² W. Márquez, ¿Privatiza Estados Unidos la guerra contra las drogas?, *BBC Mundo* (Jan. 16, 2012), available at http://www.bbc.co.uk/mundo/noticias/2012/01/111208_eeuu_pentagono_guerra_drogas_mercenarios_wbm.shtml

¹⁰⁵³ Interview with Armando Luna, *supra* note 1041.

¹⁰⁵⁴ Diplomatic and consular protection are regulated by the Vienna Convention on Diplomatic Relations, (April 18, 1961; entered into force on April 24, 1964). 500 UNTS 95; Vienna Convention on Consular Relations, (April 24, 1963; entered into force March 19, 1967) 596 UNTS 261; and the Convención Consular entre los Estados Unidos Mexicanos y los Estados Unidos de América, (July 17, 1943). Interview with Armando Luna, *supra* note 1041. However, I have no example of US PMSCs or US PMSC employees working in the US mission in Mexico.

mostly of training the federal police.¹⁰⁵⁵

Regardless of whether they serve private or public clients, multinational PMSCs face two legal hurdles: first, under Mexican law, only Mexican citizens may establish and own a PMSC and second, there are strict restrictions on keeping and bearing weapons.¹⁰⁵⁶ Rather than complying with these limitations, however, PMSCs operating in Mexico have found a way to sidestep the law: they establish themselves in neighboring countries and work remotely or travel to Mexico for short periods of time.¹⁰⁵⁷ This is possible because the “Mexican private security market, unlike in Iraq or Afghanistan, does not require the show of force or high-caliber weapons. Work in Mexico is based more on contacts, prevention and intelligence.”¹⁰⁵⁸

By managing operations from abroad, these PMSCs have been successful in evading Mexican law. Even if PMSCs’ activities within Mexico make them subject to Mexican law, it is not clear that there would be capacity or will on the part of the Mexican government to implement or enforce the law. The latter—will to enforce the law—is of particular concern given that PMSCs working under the Merida Initiative are among those who use these tactics to evade Mexican law.¹⁰⁵⁹

This reality of PMSCs operating outside the law raises concerns about accountability and respect for human rights. In fact, despite working with multinational PMSCs only a short time, Mexico has already witnessed negative effects stemming from PMSC operations under the Merida Initiative. For instance, there have been allegations about PMSCs providing training in torture techniques to Mexican police.¹⁰⁶⁰ Similarly, several cases of torture and disappearance

¹⁰⁵⁵ Interview with Armando Luna, *supra* note 1041.

¹⁰⁵⁶ Ley Federal de Seguridad Privada, *supra* note 1028, Art. 25 § I. The nationality limitation has been under discussion, but remains unchanged to the date of writing (August 2014). See E. Méndez, ‘Extranjeros podrán participar en las empresas de seguridad privada’, *La Jornada* (April 11, 2012), available at <http://www.jornada.unam.mx/2012/04/11/politica/003n2pol>. See Ley Federal de Armas de Fuego y Explosivos [LFAFE], available at www.diputados.gob.mx/LeyesBiblio/pdf/102.pdf.

¹⁰⁵⁷ Phone interview with PMSC employee, *supra* note 1051; interview with Armando Luna, *supra* note 1041.

¹⁰⁵⁸ Interview with Manager of PMSC, Washington DC, October 18, 2012.

¹⁰⁵⁹ Phone interview with PMSC employee, *supra* note 1051.

¹⁰⁶⁰ “One of the videos, obtained two weeks ago by the newspaper *El Heraldo de Leon*, shows police appearing to squirt water up a man's nose, a torture technique once notorious among Mexican police. They then dunk his head in a hole that an unidentified voice on the video says is full of excrement and rats. In another video, an unidentified English-speaking trainer asks a police agent to roll in his own vomit. The English-speaking man belonged to a private U.S. security company hired to help train the agents.” In Fox News, *Report Mexico cop in*

by public forces have been reported.¹⁰⁶¹ Ultimately,

[s]upervision and accountability mechanisms for police officers, military personnel, prosecutors, forensic scientists, medical examiners or judges as well as defence lawyers and representatives of the national and state human rights commissions remain inadequate and judicial reforms have largely failed to address the impunity that results from this lack of accountability.¹⁰⁶²

Considering the current situation of armed conflict and drug-related violence in Mexico, an appropriate use of PMSCs could act as a force multiplier and increase safety and security;¹⁰⁶³ however, the current lack of control on PMSCs provides criminal groups the opportunity to use PMSCs in furtherance of their activities and raises concerns about respect for human rights.

torture case fired, July 19, 2008, available at

http://www.foxnews.com/printer_friendly_wires/2008Jul19/0,4675,MexicoPoliceTorture.00.html. See also D. Bonello, *supra* note 622.

¹⁰⁶¹ Human Rights Watch, *Mexico's Disappeared, The Enduring Cost of a Crisis Ignored*, (2013) available at <http://www.hrw.org/sites/default/files/reports/mexico0213webwcover.pdf>; Human Rights Watch, *Mexico: Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico's "War on Drugs,"* *supra* note 623.

¹⁰⁶² Amnesty International, *Known abusers, but victims ignored: torture and ill-treatment in Mexico*, (2012), available at <http://www.amnestyusa.org/research/reports/known-abusers-but-victims-ignored-torture-and-ill-treatment-in-mexico>, at 25.

¹⁰⁶³ As discussed above, a “well-regulated private security sector can, in cooperation with the police, act as a ‘force multiplier’, increasing the overall sense of security.” R. Abrahamsen and M. C. Williams, *supra* note 4, at 17. Emphasis added.

Chapter 9: Haiti

The past twenty years in Haitian history have been marked by political turmoil, economic crises, natural disasters, and humanitarian emergencies. The result has been a constant instability that has led the United Nations to intervene in the country on several occasions.¹⁰⁶⁴ The most recent UN intervention came in 2004, prompted by a coup that caused Haiti's already fragile situation to deteriorate further.¹⁰⁶⁵ Although the situation improved starting in 2007, the earthquake of January 2010 represented a significant setback; as a result, the UN mission was extended and is still ongoing. The current situation is a mix of two situations—violence and post-disaster—which presents a challenge to the task of defining the law applicable.

The instability, international intervention, and security challenges have been a boon for the private security market. As in Colombia and Mexico, in Haiti the private security sector has both domestic and international customers: PMSCs work for private actors at the domestic level and, at the international level, for the UN. Perhaps unsurprisingly, the regulation of PMSCs in Haiti is inadequate and PMSCs represent a threat to human rights there, much as is the case in Colombia and Mexico. Meanwhile, perhaps surprisingly, the UN contributes to this state of lawlessness because PMSCs working with the UN benefit from *de facto* immunity.¹⁰⁶⁶ This chapter discusses Haiti's recent history and the definition of the complex situation. It further analyzes the regulation of PMSCs in Haiti and the specific case in which PMSCs work for the UN mission in Haiti.

¹⁰⁶⁴ See for instance: S. Von Einsiedel and D. M. Malone, 'Peace and Democracy for Haiti: A UN Mission Impossible?', 20 (2) *International Relations* (2006) 153-174; D. Malone (ed), *The United Nations Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rienner, 2004); D. M. Malone, *Decision-Making in the UN Security Council: The Case of Haiti 1990–1997* (Oxford: Clarendon 1998); C. Kumar, *Building Peace in Haiti* (Boulder: Lynne Rienner/International Peace Academy, 1998).

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ See the second part of this chapter.

9.1 Conflict, post-conflict, and post-disaster: definition of the situation

Haiti has long been mired in political instability, economic disaster, and bloodshed, an outlier even in a region where nearly every country has survived repressive, violent, and kleptocratic regimes.¹⁰⁶⁷ International actors including the US and the UN have intervened on several occasions, but with only short-term or limited effect.¹⁰⁶⁸ A massive earthquake ravaged the capital of the country almost a half-decade ago and it has not yet recovered, despite—or, some might say, because of—the ongoing presence of the UN.¹⁰⁶⁹ The state remains weak while the army has regained strength, which could be positive, as there are several armed non-state actors active in the country, or negative, considering the military’s history of meddling in politics.¹⁰⁷⁰

The ever-changing circumstances in Haiti have caused the situation to evolve over time. An analysis of the different armed groups active in the country and the intensity of the violence in 2004 permit classifying the situation as an armed conflict at that time. However, despite ongoing serious violence since the earthquake, the violence has not reach a level comparable to 2004 and is not an armed conflict. Nevertheless, the situation remains highly complex and may benefit from analysis under a new framework of an emerging body of law.

¹⁰⁶⁷ Haiti was called the “world’s first permanent failed state.” International Crisis Group, *Haiti After the Elections: Préval’s 100-day challenges*, Latin America/Caribbean Briefing No.15, (May 4, 2007). See also M. Gélin-Adams and D. M. Malone, ‘Haiti: A Case of Endemic Weakness’, in R. I. Rotberg (ed), *State Failure and State Weakness in a Time of Terror* (Washington, DC: Brookings Institution, 2003), at 287–304. Haiti suffered “from five primary competency gaps: legitimacy, order, security, maintenance of the rule of law, and an inability to deliver minimum public services.” In M. Silva, ‘Island in Distress: State Failure in Haiti’, 23 *Fla. J. Int’l L.* (2011) 49, at 50.

¹⁰⁶⁸ S. Von Einsiedel and D. M. Malone, *supra* note 1064. D. Malone (ed), *The United Nations Security Council: From the Cold War to the 21st Century*, *supra* note 1064; D. M. Malone, *Decision-Making in the UN Security Council: The Case of Haiti 1990–1997*, *supra* note 1064.

¹⁰⁶⁹ D. Beeton, *Soldiers Without a Cause: Why Are Thousands of UN Troops Still in Haiti?*, 45 (1) *NACLA Report on the Americas* (Spring 2012) 6-11.

¹⁰⁷⁰ R. Reserve, ‘Haiti: Cuando el Pasado es Demasiado Pesado’, 33 (1) *Revista de ciencia política* (2013) 225-245.

9.1.1 History of Haitian instability

The history of Haiti is punctuated by international occupation and domestic tyranny: “Haiti’s strategic geographic situation has ensured both that foreign state powers and foreign non-state groups, such as slave- and drug-trafficking networks, have intervened frequently.”¹⁰⁷¹

Haiti became independent in 1791 after slaves successfully rebelled against French colonialism; however, despite this early success, Haiti has struggled to achieve political stability in the centuries since independence.¹⁰⁷² France was the first free country to recognize independent Haiti—this it only did in exchange for payment for the loss of property caused by the liberation of French slaves.¹⁰⁷³ Before Haiti had even finished paying back France, which did not occur until the mid-twentieth century, the United States started intervening in Haiti.¹⁰⁷⁴ The US ruled Haiti from 1915 to 1934 during which time it developed and trained a strong army.¹⁰⁷⁵

After the US’ departure, Haiti experienced several military governments.¹⁰⁷⁶ By the time François Duvalier won the presidency, with the military’s support, in 1957, he had observed the military’s role in putting individuals in power, as well as unseating them.¹⁰⁷⁷ Responding preemptively to the latter threat, President Duvalier created a militia—*Volontaires de la Sécurité Nationale*, often known as the *Tonton Macoutes*—to counter the military’s power; eventually, this militia was also widely used to terrorize any of Duvalier’s opponents.¹⁰⁷⁸

Duvalier was not the last to adopt this strategy of building a militia as a safeguard against the military. Jean-Bertrand Aristide, who was elected in 1990 then ousted by a military junta in

¹⁰⁷¹ J. Cockayne, ‘Winning Haiti’s Protection Competition: Organized Crime and Peace Operations Past, Present and Future’, 16 (1) *International Peacekeeping*, (2009) 77-99, at 78.

¹⁰⁷² P. Girard, *The Tumultuous History - From Pearl of the Caribbean to Broken Nation* (New York, Palgrave Macmillan Trade, 2010)

¹⁰⁷³ P. Hallward, ‘But see Option Zero In Haiti’, 27 *New Left Review* (2004), 23, available at <http://www.ijdh.org/pdf/NLRart.pdf>.

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ H. Schimtt, *The United States Occupation of Haiti, 1915-1934* (New Jersey: Rutgers University Press, 1995).

¹⁰⁷⁶ P. Hallward, *supra* note 1073.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ *Ibid.*

1991, returned to power with the support of the US in 1994.¹⁰⁷⁹ At that point, he abolished the military and “established an interim police force of selected ex-military personnel, and began to train a professional, civilian Haitian National Police (HNP) force.”¹⁰⁸⁰ He also created his own forces, distributing weapons to youth groups in exchange for their support.¹⁰⁸¹

Aristide retained popular support until the end of his five-year term; however, he had agreed to abide by the Haitian constitution’s prohibition of immediate reelection in exchange for a promise of US assistance with regaining the presidency down the road.¹⁰⁸² René Préval, a close ally of Aristide, was elected as Aristide’s successor.¹⁰⁸³ In 2000, Aristide returned to power after a controversial election, marked by extremely low voter turnout.¹⁰⁸⁴ The opposition demanded that the election be annulled, and a new election was organized.¹⁰⁸⁵ Aristide won the second election in November 2000, but the opposition did not recognize him as president.¹⁰⁸⁶ By fall 2003, popular support for Aristide had declined; he ruled the country with authoritarian methods, relying on armed groups, like *Les Chimères*.¹⁰⁸⁷ In the beginning of 2004 the situation deteriorated even further. “A rebel group, the Artibonite Revolutionary Resistance Front, led by Buteur Metayer, Guy Philippe and Louis-Jodel Chamblain, carried out a military campaign to force Aristide out of office and successfully gained control of over half of the country.”¹⁰⁸⁸ This coalition of former *Forces Armées d’Haiti* (ex-FAdH, former

¹⁰⁷⁹ M. Taft-Morales, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns*, Congressional Research Service, Report for Congress (Washington, DC, 2006), at 9.

¹⁰⁸⁰ *Ibid.*

¹⁰⁸¹ D. C. Becker, ‘Gangs, Netwar, and “Community Counterinsurgency in Haiti’, 2(3) *Prism* (2010), at 137.

¹⁰⁸² Constitution de Haiti, Art. 134.3: “Le Président de la République ne peut bénéficier de prolongation de mandat. Il ne peut assumer un nouveau mandat, qu’après un intervalle de cinq (5) ans. En aucun cas, il ne peut briguer un troisième mandat.” available at <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987fr.html>. See also M. Taft-Morales, *supra* note 1079, at 297.

¹⁰⁸³ A. Louis, *Déjà-vu The Collapse of Haiti* (Bloomington: Iuniverse, 2011), Chapter 5.

¹⁰⁸⁴ G. Hammond, *Saving Port-au-Prince: United Nations Efforts to Protect Civilians in Haiti in 2006–2007*, The Stimson Center (June 2012), available at <http://www.stimson.org/images/uploads/research-pdfs/minustah4.pdf>.

¹⁰⁸⁵ A. Louis, *supra* note 1083.

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ Aristide used *Les Chimères* to suppress opposition, following a long tradition of paramilitary groups manipulated by politician—for example, Duvalier and the *Tonton Macoutes*.

¹⁰⁸⁸ Armed Conflict Database, Monitoring conflict worldwide, Haiti, available at <https://acd.iiss.org/en/conflicts/haiti--archived-2009-f311>. See also Upsala database available at <http://www.ucdp.uu.se/gpdatabase/gpcountry.php?id=70#http://www.ucdp.uu.se/gpdatabase/gpcountry.php?id=70#>.

Haitian military) forced Aristide to leave the country in 2004.¹⁰⁸⁹

From when Aristide took the presidency in 1991 until the moment he left in 2004, the security situation in Haiti deteriorated significantly.¹⁰⁹⁰ Conflict between pro- and anti-Aristide groups continued to make securing the country extremely difficult.¹⁰⁹¹ Haiti's political instability made it attractive to DTOs and it soon became one of the main transit points in the Americas for illegal narcotics,¹⁰⁹² contributing to the expanse of corruption into the upper echelons of government.¹⁰⁹³ Several insurgent groups started to occupy part of the territory, and there was a dramatic increase in homicides and kidnapping.¹⁰⁹⁴ Amnesty International reported that "a number of electoral candidates, party members and their relatives were killed, most by unidentified assailants."¹⁰⁹⁵ Aristide's opposition openly called for another US intervention to reestablish order in Haiti and rebuild the army.¹⁰⁹⁶

Following violent clashes during anti-Aristide protests in Port-au-Prince and the spread of the rebellion, the UN Security Council passed Resolution 1529 which authorized Canadian, French, and US troops to enter Haiti to provide security and stabilize the country.¹⁰⁹⁷ Shortly

¹⁰⁸⁹ Aristide says U.S. deposed him in 'coup d'etat', *CNN.com* (March 2, 2004) available at <http://edition.cnn.com/2004/WORLD/americas/03/01/aristide.claim/>. See also An Interview with Jean-Bertrand Aristide, *Znet* (February 19, 2007), available at <http://www.zcommunications.org/an-interview-with-jean-bertrand-aristide-by-jean-bertrand-aristide.html>.

¹⁰⁹⁰ The economic situation was also deteriorating at this time. The US decided to cut its aid and blocked loans made by the Inter-American Development Bank. Aristide tried to obtain financial assistance from other sources, such as France. "In 2003, Haiti's president, Jean-Bertrand Aristide, called on France to repay the 1825 indemnity, which he blamed for his country's poverty. The argument was historically sound: to pay France, Haiti had had to borrow money from French banks, entering a century-long cycle of debt. But a French commission concluded that, while there was a responsibility on France's part, financial reparation was not the solution. Its report suggested that French aid to Haiti was a kind of "reparation" and urged more of it." In L. Dubois, 'Confronting the Legacies of Slavery', *New York Times* (October 28, 2013) available at <http://www.nytimes.com/2013/10/29/opinion/international/confronting-the-legacies-of-slavery.html>.

¹⁰⁹¹ International Crisis Group, *Consolidating Stability in Haiti*, Latin America/Caribbean Briefing No.21, (July 18, 2007), available at <http://www.crisisgroup.org/en/regions/latin-america-caribbean/haiti/021-consolidating-stability-in-haiti.aspx>.

¹⁰⁹² R. I. Rotberg, 'The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair' in R. I. Rotberg (ed), *When States Fail: Causes and Consequences* (Princeton: Princeton University Press, 2004), at 19.

¹⁰⁹³ D. Adams, 'Taint of drugs reaching Haiti's upper echelons', *St Petersburg Times* (April 3, 2004), available at http://www.sptimes.com/2004/04/03/Worldandnation/Taint_of_drugs_reachi.shtml.

¹⁰⁹⁴ Freedom House overview and at 2, <http://www.freedomhouse.org/report/freedom-world/2006/haiti>.

¹⁰⁹⁵ Amnesty International, *Amnesty International Report 2001 - Haiti*, 1 June 2001 available at: <http://www.refworld.org/docid/3b1de37710.html>.

¹⁰⁹⁶ P. Hallward, *supra* note 1073.

¹⁰⁹⁷ Security Council, Resolution 1529 (2004).

thereafter, the Security Council established the *Mission des Nations Unies pour la stabilisation en Haïti* (MINUSTAH, United Nations Stabilization Mission in Haiti) per Resolution 1542 (2004).¹⁰⁹⁸ The extensive mandate for its military component included direct provision of security.¹⁰⁹⁹ More than 6,000 soldiers and 1,500 police officers were deployed to:

support the Transitional Government in ensuring a secure and stable environment; to assist in monitoring, restructuring and reforming the Haitian National Police; to help with comprehensive and sustainable Disarmament, Demobilization and Reintegration (DDR) programmes; to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti; to protect United Nations personnel, facilities, installations and equipment and to protect civilians under imminent threat of physical violence; to support the constitutional and political processes; to assist in organizing, monitoring, and carrying out free and fair municipal, parliamentary and presidential elections; to support the Transitional Government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights; and to monitor and report on the human rights situation in the country.¹¹⁰⁰

Despite the presence of the MINUSTAH, the second half of 2004 was marked by a rise in violence in Haiti.¹¹⁰¹ To face the challenges posed by the situation, the MINUSTAH chose to deploy military forces, an option authorized under Chapter VII of the UN Charter.¹¹⁰² However, it lacked support from the Interim Government of Haiti to truly fight the ex-FADH and the gangs.¹¹⁰³

After the election of President Préval in 2006, his government and the UN agreed to address the violence. In execution of this agreement, the MINUSTAH and the HNP undertook several operations against gangs in late 2006 and early 2007, significantly improving the security situation.¹¹⁰⁴ Through Resolution 1780, adopted by the Security Council on October 15, 2007, the MINUSTAH enjoyed expanded executive and capacity-building roles in order to confront criminal organizations in Haiti, particularly through specific border management-related

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ The mandate of the MINUSTAH also includes a capacity-building mandate to develop responsible security and justice institutions, and a limited political mandate to help Haiti restore constitutional rule.

¹¹⁰⁰ MINUSTAH Mandate, at <http://www.un.org/en/peacekeeping/missions/minustah/mandate.shtml>.

¹¹⁰¹ MINUSTAH was intervening in a complex situation where no peace agreement had been signed and it was not clear who could sign such agreement. See J. Cockayne, 'Winning Haiti's Protection Competition: Organized Crime and Peace Operations Past, Present and Future', *supra* note 1071, at 86.

¹¹⁰² UN Charter, Chapter VI.

¹¹⁰³ G. Hammond, *supra* note 1084, at 15.

¹¹⁰⁴ *Ibid.*; See also Rule of Law in Armed Conflicts Project (RULAC), Haiti, http://www.geneva-academy.ch/RULAC/current_conflict.php?id_state=84.

mandates.¹¹⁰⁵ In 2007, the MINUSTAH had to “redeploy and reorient certain elements of its military and police personnel.”¹¹⁰⁶ The MINUSTAH’s mandate was extended until 2010 with similar objectives and tasks as Resolution 1780.¹¹⁰⁷

On January 12, 2010, Haiti experienced a devastating earthquake that resulted in more than 220,000 deaths and the displacement of over two million people.¹¹⁰⁸ In Resolution 1908, adopted on January 19, 2010, the Security Council “endorsed the Secretary-General’s recommendation to increase the overall force levels of MINUSTAH to support the immediate recovery, reconstruction and stability efforts in the country.”¹¹⁰⁹

The new Haitian President Martelly, took office in 2011.¹¹¹⁰ Since then the situation has not changed a great deal: in “June 2013, 280,000 internally displaced persons (IDPs) were living in camps established in the aftermath of the 2010 earthquake, according to the UN. The International Organization for Migration estimated that of 71,000 displaced households, 57,000 have no prospect of IDP sites, while at least 21,000 could face eviction.”¹¹¹¹ The lack of marked improvement in the situation gave rise to anti-government protests in fall 2013 which, in turn, “led to confrontations between protestors and Martelly supporters, which raised concerns about the resurgence of political violence in the country.”¹¹¹²

¹¹⁰⁵ UN Report of the Secretary-General on the United Nations Stabilization Mission in Haiti (August 22, 2007), S/2007/503, § 18.

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ See Security Council resolutions: 1608 (2005), 1702 (2006), 1743 (2007), 1840 (2008), 1892 (2009).

¹¹⁰⁸ MINUSTAH, United Nations Stabilization Mission in Haiti, <http://www.un.org/en/peacekeeping/missions/minustah/>.

¹¹⁰⁹ MINUSTAH, United Nations Stabilization Mission in Haiti, <http://www.un.org/en/peacekeeping/missions/minustah/>. See also Résolutions du Conseil de Sécurité, 1908 (2010) et 1927 (2010).

¹¹¹⁰ R. C. Archibold, ‘Popular Carnival Singer Is Elected President of Haiti in a Landslide’, *New York Times* (April 4, 2011), available at <http://www.nytimes.com/2011/04/05/world/americas/05haiti.html?hp>.

¹¹¹¹ Human Rights Watch, *World Report, Haiti*, (2014), available at <http://www.hrw.org/world-report/2014/country-chapters/haiti?page=1>.

¹¹¹² ‘Haiti clashes as protesters demand President Martelly resign’, *BBCnews* (November 18, 2013), available at <http://www.bbc.co.uk/news/world-latin-america-24996116>. See also ‘Episode de violence en Haïti après l’arrestation d’un opposant au président’, *Le Monde* (October 23, 2013), available at http://www.lemonde.fr/ameriques/article/2013/10/23/episode-de-violence-en-haiti-apres-l-arrestation-d-un-opposant-au-president_3501760_3222.html; ‘En Haïti, nouvelles manifestations contre Martelly’, *Le Monde* (November 18, 2013), available at http://www.lemonde.fr/ameriques/article/2013/11/18/en-haiti-manifestations-contre-michel-martelly_3515909_3222.html; Human Rights Watch, *World Report, Haiti*, *supra* note 1111.

9.1.2 Definition of the situation and the applicable law

As discussed in the Colombian and Mexican cases above, to define a situation as an armed conflict, the intensity of conflict and organization of the parties conditions need to be met.¹¹¹³

As a general observation, the intensity of the conflict in Haiti is difficult to evaluate, in part because of insufficient data overall and in part because of the challenge of disaggregating existing data to identify conflict-related incidents of crime.¹¹¹⁴ This is particularly true in Haiti due to limited government capacity.¹¹¹⁵

Furthermore, the military capacity of the actors in Haiti, state and non-state alike, is relatively weak. [See Appendix III] As a result, the intensity of the violence is not as severe as in Colombia and Mexico, where the armed groups are heavily equipped.¹¹¹⁶ Two categories of actors engaged in violence in Haiti may be considered armed groups:¹¹¹⁷ 1) ex-members of the armed forces organized in several groups collectively known as ex-FADH and 2) urban gangs.¹¹¹⁸

Haiti's recent history can be divided into four main stages: first, the period of political violence surrounding the 2004 coup (2003-2005), from the run-up to the 2004 election through

¹¹¹³ For more comprehensive discussion of these conditions see chapters on Colombia and Mexico. See also S. Vité, *supra* note 727.

¹¹¹⁴ Interview with Matthias Nowak, *supra* note 48.

¹¹¹⁵ "Credible and systematically collected statistics highlighting the levels of violence in Port-au-Prince and Haiti are difficult to find, largely due to limited government capacity and disaggregated attempts to collect information by NGOs". In G. Hammond, *supra* note 1084.

¹¹¹⁶ See Chapters Seven and Eight on Colombia and Mexico. See also Appendix III.

¹¹¹⁷ A third category of actor—criminal networks—is also engaged in violence in Haiti. However, criminal networks may not be considered armed groups. As such, they are not discussed here.

¹¹¹⁸ The Organization of American States defines gangs as: "a spontaneous effort by children and young people to create, where it does not exist, an urban space in society that is adapted to their needs, where they can exercise the rights that their families, government, and communities do not offer them. Arising out of extreme poverty, exclusion, and a lack of opportunities, gangs try to gain their rights and meet their needs by organizing themselves without supervision and developing their own rules, and by securing for themselves a territory and a set of symbols that gives meaning to their membership in the group. This endeavor to exercise their citizenship is, in many cases, a violation of their own and others' rights, and frequently generates violence and crime in a vicious circle that perpetuates their original exclusion. This is why they cannot reverse the situation that they were born into. Since it is primarily a male phenomenon, female gang members suffer more intensively from gender discrimination and the inequalities inherent in the dominant culture." In Definition and Clasifiction of 'Gangs: Executive Summary', Department of Public Security of the Organization of American States, (June 2007), available at <http://scm.oas.org/pdfs/2010/CP24469E-4.pdf>. See also A. R. Kolbe, *Revisiting Haiti's Gangs and Organized Violence*, Humanitarian action in situations other than war (HASOW) Discussion Paper 4 (June 2013), at 4.

the first year of the UN intervention; second, the escalation of violence as a result of the rise of gangs, from 2004 until 2007; third, the improvement of the security situation between 2007 and 2010; and finally, the post-earthquake period and the deterioration of the security situation from 2010 until the present time. What follows is a discussion of the intensity of the violence and the organization of the actors during each of the four stages.

9.1.2.1 Stage 1: Political violence, the 2004 coup, and the UN intervention (2003-2005)

Following the reelection of Aristide in 2000, the situation in Haiti started to deteriorate. Violence between the pro-Aristide groups—paramilitary groups such as *Les Chimère*—and the anti-Aristide groups, the ex-FADH, rose.¹¹¹⁹ The HNP were also actively involved in violence against civilians.¹¹²⁰ As mentioned above, presenting data on the intensity of violence in Haiti is a complicated task because, unlike in Colombia and Mexico, there is no systematic counting of victims of violence.¹¹²¹ According to one estimate, 1,600 individuals were violently killed between President Jean-Bertrand Aristide's ousting in February 2004 and October 2005.¹¹²² Another estimate suggests almost 8,000 murders and 35,000 incidents of sexual assault occurred in the 22 months following Aristide's ouster.¹¹²³ Based on these statistics, the situation in Haiti meets the first requirement of intensity to be classified as an armed conflict during the first period (2003 -2005).

The main armed groups active during this period were the ex-FADH—for example, the *Front pour la Libération et la Reconstruction Nationale* (National Liberation and Reconstruction

¹¹¹⁹ For instance, *Les Chimères* has participated in the massacre called “massacre de la scierie”: fifty members of Aristide's opposition were killed in the neighborhood called Scierie. See A. Fuller, ‘La tuerie de la Scierie’, *Le Nouvelliste* (avril 2005), available <http://www.haitipolicy.org/content/2938.htm>.

¹¹²⁰ G. Hammond, *supra* note 1084, at 13.

¹¹²¹ The ‘GDB Compare’ of the University of Washington which “analyze the world's health levels and trends” provide also some interesting data: in 2005: Haiti, "All Ages", Both (sex), "Interpersonal violence" [average:] 2591.77 [High:] 3459.25 [low:] 1283.93 ; the rate /100,000 hab. (same criteria : 27.6857, 36.9523, 13.7152 to compare with Colombia (same criteria) 53.2529, 64.9908, 43.9487 ; and Mexico 13.3453, 21.1398, 10.589. in GDB Compare available at <http://viz.healthmetricsandevaluation.org/gbd-compare/>.

¹¹²² R. Muggah, *Securing Haiti's Transition: Reviewing Human Insecurity and the Prospects for Disarmament, Demobilization, and Reintegration*, Small Arms Survey Occasional Paper 14 (2005), available at <http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP14-Haiti-EN.pdf>.

¹¹²³ A. Kolbe and R. Hutson, ‘Human Rights Abuse and Other Criminal Violations in Port-au-Prince: A Random Survey of Households’, 368 *The Lancet* (August 31 2006), 864–73.

Front) and the Revolutionary Artibonite Resistance Front.¹¹²⁴ The ex-FADH are groups composed by disbanded Haitian Army soldiers and their followers and “[...] [are] widely viewed as politically motivated insurgent organizations.”¹¹²⁵ In the early 2000s, ex-FADH groups launched an insurgency against the government of President Aristide.¹¹²⁶ They supported anti-Aristide gangs and attacked pro-Aristide gangs.¹¹²⁷ In 2004 there were an estimated 5,700 ex-FADH members.¹¹²⁸ Since their insurgency succeeded in 2004, they have been involved in political repression of Aristide supporters.¹¹²⁹

Despite being primarily rural and relatively poorly armed, the ex-FADH have a military structure with clearly defined leaders.¹¹³⁰ The weakness of the Haitian government offsets the ex-FADH’s limited military capacity, and the ex-FADH have been strong enough to control part of the Haitian territory and to represent a threat to state institutions.¹¹³¹ As a result, the ex-FADH can be considered an organized armed group that fought against the government of Aristide until the intervention of the MINUSTAH.¹¹³²

Because the violence was sufficiently intense and the ex-FADH were organized enough to be considered an armed group, Haiti can be considered to have experienced armed conflict in the 2003-2005 period, meaning that IHL of NIAC is the law applicable during this period of time. IHL is also applicable to the intervention of the MINUSTAH:

[IHL] is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite. Additionally, in post-conflict environments there are often large civilian populations that have been targeted by the warring parties, prisoners of war and other vulnerable groups to

¹¹²⁴ A. R. Kolbe, *supra* note 1118.

¹¹²⁵ *Ibid.*, at 5.

¹¹²⁶ International Crisis Group, *A New Chance for Haiti*, Latin America/Caribbean Report No 10 (November 18, 2004), at 8.

¹¹²⁷ *Ibid.*

¹¹²⁸ *Ibid.*, at 16.

¹¹²⁹ G. Hammond, *supra* note 1084.

¹¹³⁰ A. R. Kolbe, *supra* note 1118, figure 9 at 12.

¹¹³¹ *Ibid.*, at 4.

¹¹³² *Ibid.*

whom the Geneva Conventions or other humanitarian law would apply in the event of further hostilities.¹¹³³

9.1.2.2 Stage 2: Gangs and the intensification of violence (2004-2007)

While the ex-FADH were still involved in politically-motivated violence during part of this period, gangs became more active and gang-related violence became the main concern starting in 2004.¹¹³⁴ In July 2004, “400 peacekeepers in 41 armored vehicles and helicopters, and several dozen Haitian police officers, conducted a raid in Cité Soleil, Haiti’s largest slum—ostensibly to root out armed gang members.”¹¹³⁵ During another such operation in December 2004, 700 MINUSTAH troops deployed to Cité Soleil had to retreat quickly because of the sophistication of the gang resistance.¹¹³⁶ The military escalation continued in 2005 with, for instance, Operation Iron Fist, during which 440 troops entered Cité Soleil with almost 1,000 additional troops securing the perimeter. “MINUSTAH used some 22,700 rounds of ammunition and 78 grenades during the course of a seven-hour operation, though SRSG [Special Representative of the Secretary-General] Mulet later claimed it received some 20,000 rounds of fire in response.”¹¹³⁷

Urban gangs—for example, *Baz Labanye*, *Lame Ti*, *Machete*, and *Bois Neuf*—in Haiti are usually small.¹¹³⁸ After years of chaos and upheaval, “in many parts of the country there were virtually no government representatives and certainly no government services.”¹¹³⁹ Thus, support for gangs rose in part because they often solved local problems for residents, such as

¹¹³³ United Nations Peacekeeping Operations, Principles and Guidelines, United Nations, Department of Peacekeeping Operations, Department of Field Support, 2008, Review date: January 2010, available at <http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/Home.aspx>. See also R. Kolb, G. Porretto, and S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: Forces de paix et administrations civiles transitoires*, (Brussels: Bruylant, 2005); and R. Kolb *Droit Humanitaire et Opérations de Paix Internationales*, (2^e edn, Bâle: Helbing Lichtenhahn Verlag, 2006).

¹¹³⁴ G. Hammond, *supra* note 1084.

¹¹³⁵ R. Muggah, *supra* note 1122. This operation resulted in twenty-five to forty extra-judicial killings and at least three peacekeepers have been killed. In M. Weissenstein, ‘U.N. Peacekeeper from Philippines shot and killed as U.N. Security Council meets in Haiti’, *Associated Press* (April 14, 2005).

¹¹³⁶ J. Cockayne, ‘Winning Haiti’s Protection Competition: Organized Crime and Peace Operations Past, Present and Future’, *supra* note 1071, at 86.

¹¹³⁷ *Ibid.*, at 87.

¹¹³⁸ A. R. Kolbe, *supra* note 1118, at 4.

¹¹³⁹ D.C. Becker, *supra* note 1081, at 138.

“medical care and burial costs, paying tuition fees for disadvantaged children, garbage collection, home repair, and the organization of social and musical events.”¹¹⁴⁰

Insofar as criminal activity goes, Haitian gangs usually “engage in small-scale crime including violence against those perceived to be a threat to their neighborhood, extortion from local businesses or street merchants, and local sales of contraband.”¹¹⁴¹ They have few weapons and they do not carry them openly.¹¹⁴² Even so, the context has meant that gangs have a stronger role in Haitian society than in other places, and the violence resulting from ex-FADH and gangs activities has been described in 2005 as “akin to urban warfare.”¹¹⁴³ In 2006, the gang-related violence increased throughout the year, with several shocking incidents in the capital.¹¹⁴⁴ For instance, in July, twenty-two civilians were killed during a conflict between gangs in Port-au-Prince.¹¹⁴⁵ In another attack the same month, six civilians were killed and eighty injured during an attack against HNP and a MINUSTAH camp.¹¹⁴⁶

Typically, gangs are not considered as parties to an armed conflict. Even if in some cases they follow a strict chain of command¹¹⁴⁷ and can, as is the case in Haiti, be a source of violence and instability, gangs are not typically part of hostilities. In general, they rarely reach the level of security threat akin to a modern insurgency—that is, one that suggests an ability to challenge the state.¹¹⁴⁸ However, in Haiti, “gangs are not strictly a ‘criminal’ problem.”¹¹⁴⁹ During the period of the intensification of violence, gangs became connected to clandestine politics. “[T]hey were apparently funded, perhaps even trained, by external political, business and

¹¹⁴⁰ A. R. Kolbe, *supra* note 1118, figure 9 at 12.

¹¹⁴¹ *Ibid.*, at 4.

¹¹⁴² “The leadership of each gang often presides over small arsenals of military style and commercial weapons (e.g. Uzis, 0.38 specials, 45 mm revolvers), which are distributed to gang members on a needs basis.” R. Muggah, *supra* note 1122.

¹¹⁴³ *Ibid.*, at xvi.

¹¹⁴⁴ See International Crisis Group, *Consolidating Stability in Haiti*, *supra* note 1091, at 2.

¹¹⁴⁵ R. Lindsay, “Massacre of Haiti Innocents,” *The Guardian* (July 16 2006), available at <http://www.guardian.co.uk/world/2006/jul/16/theobserver.worldnews>.

¹¹⁴⁶ UN Report of the Secretary-General on the United Nations Stabilization Mission in Haiti (December 19 2006), S/2006/1003, § 11.

¹¹⁴⁷ A. R. Kolbe, *supra* note 1118, at 15.

¹¹⁴⁸ J. M. Hazen, *supra* note 996.

¹¹⁴⁹ D.C. Becker, *supra* note 1081, at 139.

criminal actors.”¹¹⁵⁰ The slums became a battlefield to obtain political influence¹¹⁵¹ but, “[b]ecause the alliances between gangs and national factions are not fixed, gangs operate primarily for criminal profit but can use their localized monopoly of violence to act as proxy rulers for the highest bidder.”¹¹⁵² Ultimately, the fact that gang activities threatened the Haitian state was due “not that criminal gangs were so strong but rather [that] the Haitian state was so fragile.”¹¹⁵³

Haitian gangs’ political connections and their control over part of the cities make them key actors for the reconstruction of the country and to improve security. A purely law enforcement approach would consider gangs just as criminals, which is probably counterproductive.¹¹⁵⁴ The ICRC’s experience with gangs in Haiti is telling in this regard—it illustrates how considering gangs as legitimate actors with whom to negotiate can improve the security situation.

The ICRC engaged in dialogue with Haitian gangs in Cité Soleil between 2004 and 2007 with the purpose of facilitating “a joint ICRC-Haitian Red Cross project to evacuate casualties to hospitals.”¹¹⁵⁵ During this period, the ICRC had direct and regular contact with leaders of five gangs.¹¹⁵⁶ The gangs reacted positively to the medical evacuation project, which required them “not to harm ICRC or HRC personnel, not to stop vehicles, and not to prevent any wounded people from being evacuated.”¹¹⁵⁷ The project was considered a success: in addition to improving medical evacuations, the ICRC also managed to discuss some incidents with gang leaders who were “willing to take measures to guarantee the respect of both medical personnel

¹¹⁵⁰ J. Cockayne, ‘Winning Haiti’s Protection Competition: Organized Crime and Peace Operations Past, Present and Future’, *supra* note 1071, at 84; See also T. M. Griffin, Haiti: Human Rights Investigation, November 11–21, 2004, Center for the Study of Human Rights, University of Miami School of Law, available at www.law.miami.edu/cshr/CSHR_Report_02082005_v2.pdf; International Crisis Group, *Haiti: Security and the Reintegration of the State*, Latin America/Caribbean Briefing No.12 (October 20, 2006), at 5.

¹¹⁵¹ J. Peirce, ‘Protection from Whom? Stabilization and Coercive Rule in Haiti’, 8 *Paterson Review* (Fall 2007), at 101.

¹¹⁵² *Ibid.*

¹¹⁵³ D.C. Becker, *supra* note 1081, at 138.

¹¹⁵⁴ In Haiti the Haitian National Police have special anti-gang unit but its effect has always been very limited: “[E]fforts to reduce the number of armed gangs and criminal groups in the capital have achieved limited success.” In R. Muggah, *supra* note 1122.

¹¹⁵⁵ “Dealing with gangs: the ICRC’s experience in Haiti” in *Small Arms Survey 2010: Gangs, Groups, and Guns*, *supra* note 996; based in O. Bangerter, *Dealing with Territorial Gangs: The ICRC’s Experience in Haiti (2004–07)*, Small Arms Survey Unpublished background paper.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ *Ibid.*

and the wounded.”¹¹⁵⁸ However, in further discussions they appeared very reluctant to discuss their groups’ policies on kidnappings [...] or to challenge their members on sexual violence.”¹¹⁵⁹ Apparently the “lack of both an applicable IHL framework and of traditional control mechanisms appears to have contributed to this reluctance.”¹¹⁶⁰ This experience demonstrates that gangs should not be considered only as criminals, as they can also be counterparts with whom it is possible to negotiate. They even would be able to implement IHL rules, which is an element to consider them as a party to an armed conflict.

Considering that gangs are arguably strong enough to threaten the Haitian state, the fight between the MINUSTAH, which supports the Haitian state, and the gangs during this period (2005-2007) meets the intensity of violence requirement. As such, the situation can be classified as an armed conflict and IHL of NIAC should apply.

While IHL applies, the ICRC experience also illustrates the need to consider alternative strategies for facing challenges posed by gangs.¹¹⁶¹ A traditional approach would suggest using law enforcement mechanisms to fight against criminals, in which case IHRL would be the appropriate body of law. However, the complexity of the situation in Haiti and the multitude of non-state actors active in the country suggest that an approach limited to law enforcement regulated by IHRL is not ideal. A mere armed conflict approach—regulated by IHL—would not be ideal either because, as discussed in the chapter on Mexico, it does not provide the best protection for civilians. A combination of both may offer an alternative solution.

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ *Ibid.*

¹¹⁶¹ Another more recent experience suggests the same conclusion: in El Salvador, the government permitted the church to negotiate with gangs, and they agree to a truce. The truce allowed for a significant reduction in the violence in the country. See T. Whitfield, *Mediating criminal violence: Lessons from the gang truce in El Salvador*, HD Center Oslo, Forum paper (June 2013), available at http://www.hdcentre.org/uploads/tx_news/Mediating-Criminal-Violence_01.pdf.

9.1.2.3 Stage 3: Decrease in violence (2007-2010)

Starting with the election of a new president and continuing from there, 2006 was a turning point for Haiti. The election of René Préal to the presidency in February drastically changed the security situation. On the one hand, it marked the end of the threat posed by the ex-FADH to the state because they supported President Préal.¹¹⁶² On the other hand, Préal began direct negotiations with several armed gangs in Port-au-Prince and, when these proved unsuccessful, he reacted aggressively.¹¹⁶³

He negotiated with the MINUSTAH Special Representative of the Secretary General to decisively attack the gangs in Port-au-Prince.¹¹⁶⁴ After the massive offensive against gangs during the fall of 2006 and the beginning of 2007, the MINUSTAH and the HNP arrested over 800 gang members.¹¹⁶⁵ “It is interesting to note that the improvement in security is not immediately attributable to the theory that MINUSTAH operations would cause gang infighting. Rather, it appears that success was achieved at least in part, because the [gangs] were unable to replace effective leadership.”¹¹⁶⁶

Since 2007, the security situation improved and criminality decreased until the earthquake.¹¹⁶⁷ Even though “Haiti suffers from high crime rates and chronic human rights problems,”¹¹⁶⁸ the armed groups active before that time mostly stopped their activities or have been arrested. Thus, during the third period (2007-2010), the level of violence did not reach the intensity required to be classified as an armed conflict.

¹¹⁶² G. Hammond, *supra* note 1084, at 16.

¹¹⁶³ President Préal, on Radio Kiskeya on August 10, 2006, stated that urban gangs had one choice: “Disarm or die”. In International Crisis Group, *Haiti: Security and the Reintegration of the State*, *supra* note 1150, at 11.

¹¹⁶⁴ UN Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, *supra* note 1146, § 13.

¹¹⁶⁵ G. Hammond, *supra* note 1084, at 29.

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ A. Dandoy, *Insécurité et aide humanitaire en Haïti: l'impossible dialogue?, Décrypter les enjeux des politiques sécuritaires des organisations humanitaires dans l'Aire métropolitaine de Port-au-Prince*, Groupe URD (September 2013), available at http://reliefweb.int/sites/reliefweb.int/files/resources/Groupe_URD_Etude_Securite_Aide_humanitaire-2013-2.pdf.

¹¹⁶⁸ These human rights problems include inhumane prison conditions, police violence, threats against human rights defenders, and impunity for past abuses. Lasting effects of food riots and four devastating hurricanes in 2008, compounded by corruption, drug trafficking, and the global economic crisis have undermined the state's ability to safeguard fundamental rights. In Human Rights Watch, *World Report, Haiti*, *supra* note 1111.

9.1.2.4 Stage 4: The post-earthquake period (2010-present)

Finally, following the earthquake, the violence increased, even though it was not the security crisis expected by several analysts.¹¹⁶⁹ As a result of widespread damage to buildings and infrastructure, 5,000 prisoners escaped from jail after the walls collapsed, including 500 dangerous criminals affiliated with armed groups.¹¹⁷⁰ The situation deteriorated, particularly in Port-au-Prince, where “incidences of armed violence in camps have risen significantly.”¹¹⁷¹ The number of violent deaths increased from seventy-five per month in 2011 to ninety-nine per month in 2012 and the number of kidnappings also rose during the same period.¹¹⁷² Unlike in the first stage, the violence is not uniformly widespread, but rather localized in specific areas: in 2011, “[r]esidents of ‘popular zones,’ densely packed urban areas of low socio-economic status, were 40 times more likely to be murdered than other urban dwellers.”¹¹⁷³

Gangs have continued to be active, and it is even possible that the ex-FADH are beginning to reappear on the scene;¹¹⁷⁴ “[r]ecently, ex-FADH groups occupied former military bases and other government properties throughout the country and conducted a training program for new recruits.”¹¹⁷⁵ The groups’ membership “ranges from several dozen to several hundred.”¹¹⁷⁶

¹¹⁶⁹ International Crisis Groups, *Garantir la sécurité en Haïti: réformer la police*, Update Briefing (September 2011), available at <http://www.crisisgroup.org/~media/Files/latin-america/haiti/B26%20Keeping%20Haïti%20Safe%20--%20Police%20Reform%20FRENCH.pdf>, at 2; phone interview with an UN Human Rights Officer, Port-au-Prince, June 2010.

¹¹⁷⁰ ‘Haiti police appeal for help over escaped prisoners’, *BBC news* (January 22, 2010), available at <http://news.bbc.co.uk/2/hi/8474293.stm>. See also, International Crisis Group, *Garantir la sécurité en Haïti: réformer la police*, Briefing Amérique latine/Caraïbes N°26, (September 8, 2011).

¹¹⁷¹ A. Gillman, *Haiti Looking Forward: Potential Areas for AFSC Action*, (2011), available at <http://www.american.edu/clals/upload/FINAL-Haiti-Looking-Forward-paper.pdf>.

¹¹⁷² Conseil de Sécurité, Rapport du Secrétaire général sur la Mission des Nations unies pour la stabilisation en Haïti (August 31, 2012) S/2012/678, § 11. Fédération International des Droits de l’Homme (FIDH), *Haïti La Sécurité humaine en danger*, Octobre 2012, at 111.

¹¹⁷³ A. R. Kolbe, R. Muggah, and M. N. Puccio, *The Economic Costs of Violent Crime in Urban Haiti Results from Monthly Household Surveys August 2011- July 2012*, Intituto Igarape, Strategic Brief (September 2012), available at http://www.hicn.org/wordpress/wp-content/uploads/2012/08/economic_costs_violent_crime_in_urban_haiti.pdf.

¹¹⁷⁴ J. Sprague, ‘Report on Ex-Fad’H camp near Port-au-Prince’, (March, 2011), available at <http://jebsprague.blogspot.com/2011/03/ex-fadh-camp-near-port-au-prince-march.html>.

¹¹⁷⁵ A. R. Kolbe, *supra* note 1118, at 4.

¹¹⁷⁶ *Ibid.*

However, for the moment the ex-FADH are not likely to threaten the state again as they support the elected President Martelly.¹¹⁷⁷

While violence remains a problem in Haiti, in the post-earthquake period it has not reached the level seen in the first or second stages (2003-2005 and 2004-2007, respectively).¹¹⁷⁸ Thus, following the tendency of the majority of databases on armed conflict and “because there have been few reported conflict deaths over the past two years (less than 25 per year), this armed conflict is now deemed to have ended.”¹¹⁷⁹ This means that IHL does not apply to the current situation in Haiti.

9.1.3 Emerging law on post-disaster environments

The analysis in the preceding section considers the limited question of if the situation is or has been an armed conflict; however, this inquiry is too narrow, given the various complexities at play in Haiti. In particular, the January 2010 earthquake in Haiti and the subsequent post-disaster situation may change—or at least add—some elements to the discussion of the law applicable.

The deaths, destruction, and displacement caused by the earthquake suggest that the emerging law on post-disaster situations may apply to stage 4 (2010-present). The relevant norms for a post-disaster situation can be found in the domains of IHRL, IHL, and refugee and internally displaced person law, as well as an emerging category known as international disaster response laws, rules, and principles (IDRL).¹¹⁸⁰

¹¹⁷⁷ J. Sprague, *supra* note 1174.

¹¹⁷⁸ International Crisis Groups, *Garantir la sécurité en Haïti: réformer la police*, *supra* note 1169, at 2.

¹¹⁷⁹ Project Ploughshares, Armed Conflicts Report (Haiti) <http://www.ploughshares.ca/content/armed-conflicts-report-0>.

¹¹⁸⁰ D. Fisher, ‘Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis’, 89 (866) *Int’l Rev. of the Red Cross*, (June 2007), available at http://www.icrc.org/eng/assets/files/other/irrc_866_fisher.pdf.

Concerning IHRL, the three general state obligations—to respect, protect, and fulfill—included in most human rights treaties are applicable to post-disaster situations.¹¹⁸¹ The UN Human Rights Committee has also asserted that states must take positive steps to reduce mortality—with measures to “eliminate malnutrition and epidemics,” for example.¹¹⁸² There is also a set of rights protected even in situations of emergency, such as the rights to life,¹¹⁸³ food,¹¹⁸⁴ housing,¹¹⁸⁵ clothing,¹¹⁸⁶ health,¹¹⁸⁷ and livelihood.¹¹⁸⁸ Considered together, these can be interpreted as “an obligation to allow access to international humanitarian relief when it is required to avoid loss of life.”¹¹⁸⁹

Even though there has not been an armed conflict in Haiti since approximately 2007, the complexity of the situation and the presence of armed groups mean that the Haitian government and the MINUSTAH face threats similar to those present in an armed conflict situation. For instance, certain parts of the Haitian territory are not safe enough for a state intervention, making it difficult to ensure that people in those areas have access to disaster relief resources.¹¹⁹⁰ During an armed conflict, “from a practical point of view, the consent of relevant non-state armed groups controlling or operating in the territory in question is necessary for relief actions to be carried out,” but this is not typically the case outside of the armed conflict context.¹¹⁹¹ However, obtaining the consent of the non-state actors might be an

¹¹⁸¹ *Ibid.*

¹¹⁸² Committee on Social, Economic and Cultural Rights, General Comment No. 12, The right to adequate food, UN Doc. No. E/C.12/1999/5 (1999), §§ 6 and 17.

¹¹⁸³ See for instance: Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (1948) (hereinafter UDHR), Art. 3; CCPR, Art. 6(1); Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (hereinafter CRC), Article 6(1); ACHR, Art. 4(1); ECHR, Art. 2(1); and African Charter on Human and Peoples’ Rights, (hereinafter AfCHPR), Art. 4.

¹¹⁸⁴ See UDHR, Art. 25, International Covenant on Economic Social and Cultural Rights, 16 December 1966, 999 UNTS 3 (hereinafter CESCR), Art. 11(1); CRC, Art. 24(2)(c) and 27(1). Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 513 (hereinafter CEDAW), Art.12(2) and 14(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, (adopted November 17, 1988), OAS Treaty Series No. 69, Art. 12.

¹¹⁸⁵ See UDHR, Art. 25; CESCR, Art. 11(1)

¹¹⁸⁶ UDHR, Art. 25; CESCR, Art. 11(1). See also CRC, Art. 27(3)

¹¹⁸⁷ See UDHR, Art. 25; CESCR, Art. 12. See also CRC, Art. 24(1); AfCHPR, Art. 16(1), Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, Art. 10.

¹¹⁸⁸ See UDHR, Art. 25; CESCR, Art. 6.

¹¹⁸⁹ D. Fisher, *supra* note 1180, at 348.

¹¹⁹⁰ The territory controlled by armed groups, see above at *supra* note 1175.

¹¹⁹¹ F. Schwendimann, ‘The legal framework of humanitarian access in armed conflict’, 93 (884) *Int’l Rev. of the Red Cross*, at 1001. See also: D. Plattner, ‘Assistance to the civilian population: the development and present state of international humanitarian law’, 32 (288) *Int’l Rev. of the Red Cross* (1992), 249-263; J. Dungen, ‘A right

option for accessing the population affected by the disaster—this need not constitute recognition or bestow any legal status upon that actor, but may allow humanitarian actors to do their work in a more secure environment.¹¹⁹² In this way, maintaining an IHL/post-conflict perspective in Haiti may be useful in considering the post-disaster period and environment.

Another that must be contemplated is that persons displaced by disasters are not considered refugees but can be considered internal displaced persons.¹¹⁹³ The international instrument of reference regarding IDPs is the Guiding Principles on Internal Displacement.¹¹⁹⁴ These principles require states to allow humanitarian access for persons displaced by disasters and conflicts, among other situations.¹¹⁹⁵

IDRL includes a category of instruments and norms relevant to disaster assistance. These instruments and norms are mostly compiled in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted by the International Federation of Red Cross and Red Crescent Societies. These Guidelines do not apply “to situations of armed conflict or disasters that occur during armed conflicts” and they are not intended “to imply changes in any rules governing relief in those contexts.”¹¹⁹⁶ Rather, “disaster” is defined as:

a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict.¹¹⁹⁷

to humanitarian assistance in internal armed conflicts respecting sovereignty, neutrality and legitimacy: practical proposals to practical problems’, *Journal of Humanitarian Assistance* (2004), available at <http://sites.tufts.edu/jha/archives/838>.

¹¹⁹² F. Schwendimann, *Ibid.*, at 1001.

¹¹⁹³ UN Guiding Principles on Internal Displacement, (1998) UN Doc. No. E/CN.4/1998/53/Add.2.

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ *Ibid.*, Principles 3 and 25.

¹¹⁹⁶ *Ibid.*, Purpose and Scope.

¹¹⁹⁷ IDRL Guidelines, Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, definitions, available at <http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20%282%29.pdf>.

The substance of the Guidelines is based primarily on international laws, rules, norms, and principles, as well as on lessons learned and good practices from the field.¹¹⁹⁸ States parties to the Geneva Conventions, including Haiti, adopted these Guidelines at the International Conference of the Red Cross and Red Crescent in 2007.¹¹⁹⁹ In 2008, the UN General Assembly adopted three resolutions encouraging states to make use of the Guidelines.¹²⁰⁰ These Guidelines are most useful if states implement them in advance of a disaster. This would allow for a quicker humanitarian response by helping avoid legal operations issues thanks to visa, customs, and transportation facilitation; tax exemptions; and a simplified process for acquiring temporary domestic legal personality, which is important for international humanitarian actors like NGOs.¹²⁰¹ Several countries have taken steps to implement new regulations based on the Guidelines—Haiti is among them.¹²⁰²

The ILC is also engaged in advancing a framework for disaster response; for example, in 2006 the Commission included the topic “Protection of persons in the event of disasters” in its long-term program of work.¹²⁰³ The ILC program aims to develop a legally binding international disaster response framework at the global level.¹²⁰⁴ While the ILC’s work in this area is still in progress, it has already provisionally adopted several articles.¹²⁰⁵ The ILC Draft Articles include a duty for states to seek assistance when their national response capacity is exceeded; a duty for states not to arbitrarily withhold consent to external assistance; and a right for the

¹¹⁹⁸ *Ibid.*; see also <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/>.

¹¹⁹⁹ IDRL Guidelines, *Ibid.*

¹²⁰⁰ *Ibid.* See also UN General Assembly Resolution 63/139: Strengthening of the coordination of emergency humanitarian assistance of the United Nations available at http://www.iom.ch/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_RES_63_139_EN.pdf. See also UN General Assembly Resolution 63/141 and UN General Assembly 63/137.

¹²⁰¹ IDRL Guidelines, *Ibid.*

¹²⁰² See IDRL Guideline, About the Program, Haiti available at <http://ifrc.org/en/what-we-do/disaster-law/news/americas/country-projects-haiti/>. There is also an Inter-American Convention to Facilitate Assistance in Cases of Disaster, 7 June 1991, available at <http://www.oas.org/legal/intro.htm>.

¹²⁰³ ILC (61st session), Report of the International Law Commission (2009) UN Doc. A/61/10. § 257.

¹²⁰⁴ *Ibid.*

¹²⁰⁵ Art. 1 to 5 in 2009; Art. 6 to 9 in 2010; Art. 10 and 11 in 2011; Art. 5 *bis* and 12 to 15 in 2012; Art. 5 *ter* and 16 in 2013; See ILC (61st session), *Ibid.* ILC (62nd session), Protection of persons in the event of disasters (2010) UN Doc. A/CN.4/L.776; ILC (63rd session), Fourth report on the protection of persons in the event of disasters, (2011) UN Doc. A/CN.4/643; ILC (64th session), Fifth report on the protection of persons in the event of disasters, (2012) UN Doc. A/CN.4/652.

international community to offer assistance.¹²⁰⁶ Due to the situation in Haiti, these obligations specifically, and IDRL more generally, are applicable in the country.

¹²⁰⁶ ILC (63rd session), *Ibid.*

9.2 PMSCs' activities in Haiti and their regulation

As in Colombia and Mexico, domestic private security companies in Haiti benefit from the situation of violence and instability, and the market is constantly growing. The domestic PMSC market in Haiti is composed by forty-one companies, which vary in size from fifty to 2,000 agents.¹²⁰⁷ PMSC agents outnumber the national police, with the former numbering approximately 12,000 agents versus 10,000 of the latter.¹²⁰⁸

The 1987 Haitian constitution defines the “Public Forces” (*Force Publique*) as comprised of the Armed Forces of Haiti and the Police Forces,¹²⁰⁹ and states that “[n]o other armed corps may exist in the national territory.”¹²¹⁰ However, presidential decrees recognize the private security industry and regulate Haitian PMSCs.¹²¹¹ The first decree, from 1988, legalized PMSCs' activities in the country and the second, from the following year, established the “principal legal framework under which [PMSCs] operate in Haiti.”¹²¹²

These first two decrees established the requirements that PMSCs must meet to be allowed to work and together they offer general guidelines for PMSCs' activities;¹²¹³ for example, they stipulate that Haitian PMSCs “must be exclusively Haitian-owned and operated and cannot have an affiliation with outside countries.”¹²¹⁴ Furthermore, PMSCs must be registered at the Ministry of Commerce and Industry, and in order to do so, they must provide certain documentation: a list of personnel, their qualifications and background, their certificates of

¹²⁰⁷ These numbers are estimations: the Haitian newspaper *Le Matin* reported that the *Ministère de l'Intérieur et des Collectivité Territoriales* (MICT, the Interior Ministry) was not able to provide number of registered PMSCs. In *Le Matin* “Comment fonctionnent nos agences de sécurité privées?” May 14, 2007, available at <http://www.haitiwebs.com/archive/index.php/t-44238.html>.

¹²⁰⁸ G. Burt, *From Private Security to Public Good: Regulating the Private Security Industry in Haiti*, Center for International Governance Innovation, SSR Issue Papers No. 9 (June 2012), at 6.

¹²⁰⁹ La Constitution de la République d'Haïti (1987), Art. 263.

¹²¹⁰ *Ibid.*, Art. 263.1.

¹²¹¹ G. Burt, *supra* note 1208, at 9.

¹²¹² *Ibid.*

¹²¹³ Republic of Haiti, Presidential Decree, Office of the President (May 22, 1989), in G. Burt, *Ibid.*, at 9.

¹²¹⁴ Art. 4 in ‘Table 3: key Articles in 1988/1989 Presidential decrees’, in G. Burt, *Ibid.*, at 9.

aptitude in the management of firearms, and a list of the weapons they will use.¹²¹⁵ PMSCs are also required to send quarterly reports to the *Ministère de l'Intérieur et des Collectivités Territoriales* (MICT, the Interior Ministry).¹²¹⁶

In 1994, a third decree made the HNP responsible for enforcing and supervising the implementation of the first two decrees.¹²¹⁷ The HNP's 2012-2016 development plan includes provisions to create a "specialized unit in the *Direction Centrale de la Police Administrative* (DCPA) tasked with oversight of the [private security] industry."¹²¹⁸

The regulatory situation for PMSCs in Haiti is similar to that in most Latin American and Caribbean countries: legislation on private security exists but there is a "lack of effective follow-up mechanisms to ensure compliance with the provisions of the legislation."¹²¹⁹ As in Colombia and Mexico, the supervision of PMSCs is lacking in Haiti. Even though, "[g]iven the persistent state of crisis that the country has faced in recent years, it is understandable that the regulation of private security was not immediately addressed by the Haitian government or its international partners,"¹²²⁰ the persistent lack of regulation of PMSCs when their use is consistently increasing presents several risks.

The lack of control increases the risk of private security "be[ing] co-opted by political groups and becom[ing] involved in criminal activity,"¹²²¹ which has happened in the past in Haiti. PMSCs may also work for gangs or criminal groups, representing an even more direct threat to security.¹²²² Control on weapons is also an issue: "[t]he existing legal and regulatory framework should theoretically provide some control over access to arms, but in practice, this is not always the case."¹²²³ Lack of training is also one of the main concerns when regulations

¹²¹⁵ *Ibid.*

¹²¹⁶ *Ibid.*

¹²¹⁷ Republic of Haiti (1994). Loi relative à la Police nationale [HNP Act], available at www.oas.org/juridico/mla/fr/hti/fr_hti_mla_gen_police.html.

¹²¹⁸ G. Burt, *supra* note 1208, at 3.

¹²¹⁹ *Public Security in the Americas: Challenges and Opportunities*, Department of Public Security of the OAS (2008) available at www.oas.org/dsp/PDFs/oea2_final_baja_ing.pdf. See also P. Arias, *supra* note 32.

¹²²⁰ G. Burt, *supra* note 1208, at 11.

¹²²¹ *Ibid.*, at 2.

¹²²² *Ibid.*, at 2-3.

¹²²³ *Ibid.*, at 12.

are poorly implemented.¹²²⁴ Several incidents have illustrated how the lack of regulation of PMSCs at the national level renders PMSCs a source of insecurity instead of a complement to public security. In 2010, not long after the earthquake, a PMSC employee killed a looter and was about to shoot another one when US soldiers intervened.¹²²⁵ Just a few days later, one PMSC agent accidentally shot another during a bank looting.¹²²⁶

Another issue presented by PMSCs in Haiti relates to the management of the companies. The first problem is specific to places where there is a post-conflict demobilization process and arises when former combatants, whether military or insurgent, own PMSCs. In Haiti, there are some reports that this may be occurring, with former combatants starting PMSCs.¹²²⁷ Second, former—or sometimes even current—members of the police or armed forces are often involved in the management of PMSCs.¹²²⁸ These former soldiers or police officers may remain well connected with local public security forces. This may render supervision by police forces—as is the regulation regime in place in Haiti—useless because police may not report incidents involving former or current colleagues.¹²²⁹

The general instability, including the activity of several violent non-state actors, has created a fertile ground for private security in Haiti to thrive. Unfortunately, as is often the case in Latin American and Caribbean countries, the situation in Haiti is characterized by “the lack of mechanisms to carry out the tasks and apply the instruments provided by law.”¹²³⁰ Inadequate regulation and control of PMSCs at the domestic level has negative consequences on public security. The presence of private security in Haiti adds more armed non-state actors in an already heavily militarized society.

¹²²⁴ N. Florquin et al., *supra* note 783.

¹²²⁵ R. Espinosa, ‘US soldiers halt violence between guards, looters’, *the Seattle Times* (January 29, 2010), available at http://seattletimes.com/html/nationworld/2010932223_apcbhaitiearthquakelooters.html.

¹²²⁶ G. Burt, *supra* note 1208, at 12.

¹²²⁷ A. Fenton, ‘Private Contractors Like “Vultures Coming to Grab the Loot”’, *IPS News* (February 27, 2010), <http://ipsnews.net/news.asp?idnews=50396>.

¹²²⁸ Interviews with PMSCs’ employees, Bogota, June-August 2008, and August 2011; phone interview with PMSC employee, Guatemala City, June 2012. See also F. Cafferata, *Privatisation of Security in Latin America: Review*, Global Consortium on Security Transformation, Working Papers Series No. 3, (June 2011), at 4.

¹²²⁹ *Ibid.*

¹²³⁰ L. Dammert, *Private Security: An Answer to Public Security Needs in Urban Centres?*, Working Paper (2008) available at: www.oas.org/dsp/documentos/Publicaciones/PUBLIC%20SECURITY-%20URBAN%20CENTERS.pdf.

9.2.1 The particular case of PMSCs working for the UN

In 1998, Kofi Annan considered that the world was not ready to privatize peace.¹²³¹ Yet, some fifteen years later, UN peace operations have been at least partly privatized. Indeed, suggestions have been made for the expanded use of PMSCs, such as “employing them as UN blue helmets or even as UN-mandated or UN-led troops carrying-out military operations.”¹²³² The UN has often used PMSCs, hired by member states for UN missions or directly by the UN—for instance, the UN Children’s Fund, World Food Programme, and UN Development Programme are regular PMSC customers—and its operations in Haiti are no exception.¹²³³ Before the 2010 earthquake in Haiti, “the UN were [sic] (prior to the disaster) using 170 non-armed UN security personnel, in addition to 180 armed guards provided by PaP Sécurité and Global Sécurité, two local Guarding companies,” according to a UN Security staff member.¹²³⁴

The nature of UN peace operations has also changed over time: they are less consensual and, thus, humanitarian organizations are increasingly subject to attack while working in the field. As a result, “[h]umanitarian organizations often require additional security in order to perform their missions,” and in Haiti, too, “[i]t is clear that this is a growing trend, with more and more organisations in the field hiring mostly local private security guards.”¹²³⁵ The use of PMSCs in peacekeeping raises several questions: what are the legal bases for the UN’s use of PMSCs? What is the law applicable to these PMSCs? Who bears responsibility for their actions, particularly in cases of human rights violations?

¹²³¹ Kofi Annan, 35th Ditchley Foundation Lecture, 26 June 1998, UN Press Release SG/SM/6613.

¹²³² S. Chesterman and A. Fisher, *supra* note 30, at 6.

¹²³³ Å. G. Østensen, *supra* note 185.

¹²³⁴ Interview by J. S. Renouf, in J. S. Renouf ‘Understanding How the Identity of International Aid Agencies and Their Approaches to Security Are Mutually Shaped’, (PhD Thesis London School of Economics, January 2011) available at

http://etheses.lse.ac.uk/171/1/Renouf_Understanding_How_the_Identity_of_International_Aid_Agencies_and_Their_Approaches_to_Security_Are_Mutually_Shaped.pdf, at 186.

¹²³⁵ A.-M. Buzatu and B. Buckland, *Private Military & Security Companies: Future Challenges in Security Governance*, Geneva Center for the Democratic Control of Armed Forces DCAF Horizon 2015, Working Paper n°3, (2010).

The Security Council defines UN operation mandates, but for their implementation the UN must look beyond its own offices. To establish forces for an operation, the Security Council can delegate the implementation to regional organizations such as the North Atlantic Treaty Organization (NATO),¹²³⁶ or it may establish a force by soliciting and accepting troop contributions from states.¹²³⁷ Forces formed through the latter approach also involve permanent staff of the UN Secretariat¹²³⁸ but “only states can provide the military forces and civilian police needed in UN peace operations.”¹²³⁹ It is through this mechanism that PMSCs normally become involved in peace operations. Indeed:

This is a particularly common practice as far as US contributions to the United Nations are concerned. In fact, since the US administrative structure does not allow for a federal police force to be seconded directly to international missions, the State Department (DoS) relies entirely on recruiting police personnel from private contractors.¹²⁴⁰

Until 2004, DynCorp International was the sole worldwide supplier of US civilian police—the common label for PMSCs providing police services.¹²⁴¹ At that point, the contract was divided and currently other companies are providing this service for the US.¹²⁴² In Haiti, Pacific Architects & Engineers (PAE) is the United States’ main source of participation in the UN Civilian Police.¹²⁴³

The majority of PMSCs’ functions in peace operations are security guard services, logistics support, and demining.¹²⁴⁴ Additionally, they provide support to or form part of the UN police—a role that was recently expanded in certain missions.¹²⁴⁵ Currently, UN police tasks

¹²³⁶ UN Charter, Art. 53.

¹²³⁷ There is theoretically a third option, in which the UN has its own forces at its disposal (UN Charter Art. 43); however, states have never agreed to create this force.

¹²³⁸ M. Bothe, ‘Peace-Keeping’ in B. Simma (ed), *The Charter of the United Nations* (Oxford: Oxford University Press, 2002), § 93.

¹²³⁹ W. J. Durch et al., ‘The Brahimi Report at Thirty (Months): Reviewing the UN’s Record of Implementation’ 8 *Intl Peacekeeping: Ybk Intl Peace Operations* (2002) 1-32, at 16.

¹²⁴⁰ Å. G. Østensen, *supra* note 185.

¹²⁴¹ *Ibid.*

¹²⁴² N. M. Serafino, *Policing in Peacekeeping and Related Stability Operations: Problems and Proposed Solutions* (Washington DC: Congressional Research Service, 2004).

¹²⁴³ Phone interview with Former PAE employee in Haiti, unknown, August 13, 2013.

¹²⁴⁴ Å. G. Østensen, *supra* note 185; *See also* D. Lilly, ‘The Privatization of Peacekeeping: Prospects and Realities’ 3 *Disarmament Forum* (2000) 53–64.

¹²⁴⁵ *Ibid.*

“include reforming and restructuring local forces, training and advice, as well as in some cases assuming responsibility for direct law enforcement.”¹²⁴⁶ Because of the tasks with which they are charged, PMSC employees may find themselves in situations in which it is possible or even likely for them to violate IHRL.

As discussed in Chapter Four, IOs are subject to international law.¹²⁴⁷ The ILC stated that “for an international organization most obligations are likely to arise from the rules of the organization”¹²⁴⁸ and also from “customary rule of international law, [...] treat[ies] or a general principle within the international legal order.”¹²⁴⁹ In Haiti, the various legal regimes applicable to the UN peace operation there would include IHL, IHRL, IDRL, the UN Charter, and also the national law of the sending state of the PMSCs’, and of Haiti, the host state.¹²⁵⁰

The complementarities of these different bodies of law is particularly important when outsourcing certain tasks to PMSCs because it provides coverage of the PMSCs’ various activities in the different contexts, regardless of if there is an armed conflict. This is even more important because “[t]he notion that military force may only be used by states seems to be embedded in the UN and collective security system. Put another way, the UN charter does not regulate the use of force by non-state actors.”¹²⁵¹

The main concern in Haiti is the accountability of PMSCs’ employees in the event of wrongful acts during their UN peace mission. It is possible that PMSCs’ employees would commit a variety of types of wrongful acts—for example, violations of IHL during hostilities, IHRL violations when they are working, and criminal violations unrelated to their mission, which may in some cases amount to IHRL violations. PMSCs performing tasks such as law enforcement in complex situations such as Haiti might be involved in all three types of violations.

¹²⁴⁶ Å. G. Østensen, *supra* note 185.

¹²⁴⁷ See Chapter Four. See also N. D. White and S. MacLeod, *supra* note 336, at 971.

¹²⁴⁸ ILC (55th session), Report of the International Law Commission (2003) UN Doc. A/58/10.

¹²⁴⁹ *Ibid.*

¹²⁵⁰ UNGA, ‘A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations’ (24 March 2005) UN Doc A/59/710 ¶ 18.

¹²⁵¹ L. Cameron and V. Chetail, *supra* note 31, at 33.

The two first categories of violations—of IHL and IHRL—raise the prospect of UN or state responsibility, as discussed in Chapter Four. In Haiti, no cases of these types have yet been reported. The third category—criminal violations—has arisen in Haiti with ¹²⁵² one allegation of repeated sexual abuses by PAE employees.¹²⁵³ The status of the person involved in such a crime will define which jurisdiction applies to him/her—that is, military disciplinary measures apply to military personnel, while UN codes of conduct and national criminal law would be applicable to civilian personnel.¹²⁵⁴

Commonly, troop-sending states are responsible for the behavior of their own troops because “[t]he general framework that applies to peace operations as agreed in participating state agreements stipulates that the contributing state retains control over military discipline and is responsible for criminal prosecution of its own troops should they be involved in criminal activity.”¹²⁵⁵ A proposed UN convention, currently under discussion, would reinforce these mechanisms of accountability. The draft would grant the host state primary jurisdiction over criminal acts except in the event that the acts are committed by UN peace operations troops.¹²⁵⁶

PMSCs’ employees working for the UN in Haiti benefit from a different status than other PMSCs working there. “As experts on mission, military observers are subject to different financial and accountability regimes as compared to their national contingent counterparts.”¹²⁵⁷ The exercise of the host state’s jurisdiction depends on “the status-of-forces agreement or status of mission agreement.”¹²⁵⁸ Only “military members of the military component of the United Nations peacekeeping operation”¹²⁵⁹ are subject to the exclusive

¹²⁵² They include sexual abuse, rape, theft and other crimes. M. Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’, 15 (2) *Journal of Conflict & Security Law* (2010), at 362.

¹²⁵³ Phone interview with PMSC employee, Haiti, August 2013.

¹²⁵⁴ UN, ‘Public Information Guidelines for Allegations of Misconduct Committed by Personnel of UN Peacekeeping and Other Field Missions’ DPKO/MD/03/00996, DPKO/CPD/DPIG/2003/001. See also the commentary on these rules in The Secretary-General Bulletin entitled ‘Status, Basic Rights and Duties of United Nations Staff Members’, issued on November 1, 2002 (ST/SGB/2002/13),

¹²⁵⁵ L. Cameron and V. Chetail, *supra* note 31, at 48.

¹²⁵⁶ Note by the Secretariat, ‘Criminal Accountability of United Nations Officials and Experts on Mission’ UN Doc. A/62/329, 11 September 2007, §§ 34-6.

¹²⁵⁷ *Ibid.*, § 62.

¹²⁵⁸ *Ibid.*, § 63.

¹²⁵⁹ *Ibid.*, § 47 (b).

jurisdiction of their own state. This would mean that “if a PMSC is sent by a state as its sole contribution to a peace operation, unless that state makes explicit provision for exercising its military or criminal jurisdiction, that PMSC should not benefit from immunity.”¹²⁶⁰

However, immunities and privileges are meant to facilitate activities and functions of foreign agents in the country where they are accredited. “[The UN] shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”¹²⁶¹ Peacekeeping personnel, including contractors, operate as UN employees and thus are subject to functional immunities—immunities covering only activities performed in the course of or incidental to official duties.¹²⁶²

“Before Blackwatergate, many clients may have assumed that outsourcing security functions in humanitarian operations meant avoiding the reputational and strategic risks associated with contractor misconduct.”¹²⁶³ However, as discussed in Chapter Four, the UN could be found responsible for the misconduct of PMSCs working in peace operations. “There is also a risk of severe reputational damage arising from an incident, undermining the agency’s credibility and reducing its access to the local population and its ability to perform humanitarian missions.”¹²⁶⁴ The damage will increase if the violations go unpunished.

The fact that PMSCs working in Haiti on the behalf of the UN may be involved in violations of IHRL can be counterproductive for the UN’s mission. The mission of the UN in Haiti is to secure the country, and special attention must be paid to the needs of women and children, as they are particularly vulnerable in complex or armed conflict situations.¹²⁶⁵ Nevertheless,

¹²⁶⁰ L. Cameron and V. Chetail, *supra* note 31, at 49.

¹²⁶¹ UN Charter, Art. 105 (1).

¹²⁶² Convention on the Privileges and Immunities of the United Nations, Art. V, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

¹²⁶³ J. Cockayne, ‘After Blackwatergate – How humanitarians can help professionalize the global security industry’, 6 (3) *Human Security Bulletin*, March 2008.

¹²⁶⁴ A. du Plessis, ‘The Global Code of Conduct for Private Security Companies: why it matters to humanitarian organisations’, 47 *Humanitarian Exchange Magazine* (June 2010).

¹²⁶⁵ See for instance: ICRC, *Women in war: a particularly vulnerable group?*, March 1, 2007, available at <http://www.icrc.org/eng/resources/documents/feature/2007/women-vulnerability-010307.htm>; ICRC, *Children protected under international humanitarian law*, October 29, 2010, available at <http://www.icrc.org/eng/war-and-law/protected-persons/children/overview-protected-children.htm>; see also ‘Vulnerabilities in armed conflicts’ Keynote address Ms. Christine Beerli, ICRC vice-president, 14th Bruges colloquium (October 17 and 18, 2013), available at <http://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm>.

peacekeepers have been involved in several incidents of sexual abuse in Haiti.¹²⁶⁶ Serious allegations of rape, including of minors, have been made against staff members of the MINUSTAH.¹²⁶⁷ Only three of them are subject to judicial prosecution.¹²⁶⁸ It is not the first time that peacekeepers are involved in sexual scandals that may undermine a UN mission's effectiveness.¹²⁶⁹

A UN mission is directly affected by misbehavior by peacekeepers. In Haiti, the fight against criminal groups or the link of armed groups with criminal networks is an important part of the UN mission. Thus, the involvement of peacekeepers in criminal activities is a threat to the UN mission. The lack of control on PMSCs and the lack prosecution and remedy when there are violations of human rights by PMSCs' employees may give rise to responsibility for Haiti and the UN.

¹²⁶⁶ See Fédération International des Droits de l'Homme (FIDH), *supra* note 1172, at 38. See also C. J. Williams, 'U.N. confronts another sex scandal', *Los Angeles Times* (December 15, 2007), available at <http://articles.latimes.com/2007/dec/15/world/fg-haitisex15>.

¹²⁶⁷ FIDH, *Ibid.*, at 38.

¹²⁶⁸ *Ibid.*

¹²⁶⁹ See for instance: S. A. Notar, 'Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo', 14 *Journal of Gender, Social Policy, and the Law* (2006) 409, at 413. See also K. J. Allred, 'Human Trafficking and Peacekeepers', in C. Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector*, (Vienna and Geneva: Study Group Information and DCAF, 2009).

Chapter 10: The role of the Inter-American System of Human Rights in improving control and accountability of PMSCs at the territorial level

The history of the Inter-American System of Human Rights and the jurisprudence it has developed illustrate why it is an appropriate forum to promote regulation of PMSCs in Latin America. The interest of the Inter-American System for this task does not stop at the System's political engagement and its comprehensive jurisprudence to defend the vulnerable, as discussed in Chapter 6. It also includes functional mechanisms—both existing in the American Convention and created by the Court through its own interpretation—which would be advantageous in regulating PMSCs. This chapter focuses on these tools.

10.1 Inter-American System of Human Rights' existing tools

The functional mechanisms of the Inter-American System of Human Rights that are relevant to the task of regulating PMSCs emerge directly from the American Convention on Human Rights and the Statutes of the IACtHR and IAComHR. The Court's advisory function, which was established by Article 64 of the American Convention on Human Rights, would allow the Court to discuss the PMSC phenomenon without waiting for a case of violation of human rights to arise.¹²⁷⁰ Meanwhile, the Court and Commission both have the option to adopt provisional measures, which could be an option for limiting the use of PMSCs until effective regulations have been developed.

¹²⁷⁰ ACHR, Art. 64 states: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states."

10.1.1 Advisory function

Article 64 of the American Convention provides the legal basis for the Inter-American Court's advisory function.¹²⁷¹ All states members and organs of the OAS—not only states that have accepted the Court's jurisdiction—can request an advisory opinion from the Court;¹²⁷² however, organs may only seek advisory opinions “within their spheres of competence” and must show a “legitimate institutional interest” in the legal question posed in the request.¹²⁷³ In terms of jurisdiction, the Court issues advisory opinions on “considerations that transcend merely formal aspects”¹²⁷⁴—more specifically, it may address questions regarding (1) the interpretation of the ACHR (pursuant to Article 64, paragraph 1),¹²⁷⁵ (2) the interpretation of “other treaties concerning the protection of human rights in the American states,” and (3) “... the compatibility of any of [American states'] domestic laws with the aforesaid international instruments.”¹²⁷⁶

The Court has discussed the scope of its advisory jurisdiction in several opinions, stating that it “is as extensive as may be required to safeguard human rights”¹²⁷⁷ within the limits set by the Convention and acknowledging that it is more extensive than any other international tribunal's advisory function.¹²⁷⁸ In its decisions, the Court has expanded the material and personal scope of its jurisdiction, emerging as a watchdog of states' obligations in the Inter-American System.¹²⁷⁹

The Court notes also that:

¹²⁷¹ ACHR, Art. 64

¹²⁷² *Ibid.*, Art. 64 (1)

¹²⁷³ *Effect of Reservations on the Entry into Force of the American Convention*, IACtHR (September 1982), Advisory Opinion, Series A No 2, § 14.

¹²⁷⁴ *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR (October 1, 1999), Advisory Opinion, Series A No 16, §§ 31- 42.

¹²⁷⁵ Pursuant to ACHR, Art. 64 (1)

¹²⁷⁶ *Ibid.*, Art. 64 (2)

¹²⁷⁷ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR (January 19, 1984), Advisory Opinion, Series A No 4.

¹²⁷⁸ D. Shelton, ‘The Jurisprudence of the Inter-American Court of Human Rights’ 10 (1) *American University International Law Review* (1996), 333-372.

¹²⁷⁹ L. Hennebel, ‘Les Références Croisées Entre Les Juridictions Internationales Des Droits De L'Homme’, in P. Martens et al. (eds) *Le Dialogue des Juges*, (Brussels: Bruylant, 2007), at 55-56.

that it is precisely its advisory jurisdiction which gives the Court a special place not only within the framework of the Convention but also within the system as a whole. This conclusion finds support, *ratione materiae*, in the fact that the Convention confers on the Court jurisdiction to render advisory opinions interpreting international treaties other than the Convention itself and, *ratione personae*, in the further fact that the right to seek an opinion extends not only to all organs mentioned in Chapter X of the OAS Charter, but also to all OAS Member States, whether or not they are Parties to the Convention.¹²⁸⁰

An advisory opinion can be requested of the Court even if the interpretation concerns a non-human rights treaty or a treaty that was concluded outside of the framework of the Inter-American system—this is true so long as the provision in question concerns human rights in one of the OAS members.¹²⁸¹ Historically, however, this is not a very limiting caveat: the Court has opted for a generalizing approach that brings various branches of public international law within its jurisdiction.¹²⁸² One advisory opinion of the Court illustrates well the expansive boundaries of the Court's jurisdiction. The Consular Relations Opinion (1999) does not address a human rights treaty.¹²⁸³ However, the Court issued its opinion interpreting Article 36(1) of the Vienna Convention on Consular Relations because it had an impact on human rights in an American state: the decision involved the United States' obligations to observe the consular rights of Mexican prisoners facing criminal prosecution.¹²⁸⁴

Notwithstanding its seemingly limitless advisory jurisdiction, the Court maintains discretionary power to decline a request for an advisory opinion.¹²⁸⁵ Its advisory jurisdiction:

is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field. It is obvious that any request for an advisory opinion

¹²⁸⁰ 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), IACtHR (September 24, 1982), Advisory Opinion No. OC-1/82, § 19. [hereinafter *Advisory Opinion on 'Other Treaties'*]

¹²⁸¹ D. Shelton, *supra* note 1278.

¹²⁸² M. C. Runavot, 'Splendeurs et misères de l'avis du juge interaméricain', Hennebel L., and Tigroudja, H., *Le particularisme interaméricain des droits de l'homme* (Paris: A. Pedone, 2009), 121-151, at 131.

¹²⁸³ M. Ferial Tinta, 'Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case', 12 (2) *EJIL*, (section C).

¹²⁸⁴ J. Calidonio Schmid, 'Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory', 16 *Duke Journal of Comparative Law & International Law* (2006), 415, at 424.

¹²⁸⁵ See for instance: *Advisory Opinion on 'Other Treaties'*, *supra* note 1280, §§ 25 and 52.

which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.¹²⁸⁶

Indeed:

the Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, *inter alia*: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.¹²⁸⁷

Furthermore, the Court has also stated that it would not provide an advisory opinion when the issue raised by a request is a jurisdictional question that would “be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion.”¹²⁸⁸ The Court must explain in an opinion when it declines to exercise jurisdiction, “although the Court will generally not render a separate decision if it finds the request admissible.”¹²⁸⁹

Another consideration regarding the Court’s advisory function—less on whether or not to issue an advisory opinion, and more regarding the substance of its opinion—pertains to the Court’s liberal interpretation of its procedural rules to allow the use of *amicus* briefs.¹²⁹⁰ During the Court's first advisory proceeding in 1982, interpreting the term “Other Treaties” in the Article 64 related to the advisory jurisdiction of the Court, the Court received the points of view of six member states and various organizations as *amici curiae*.¹²⁹¹ Judge Buergenthal cited Article 34 of the Court's Rules of Procedure as a possible basis for the Court's early

¹²⁸⁶ *Ibid.*, §25.

¹²⁸⁷ *Ibid.*, § 52.

¹²⁸⁸ *Judicial Guarantees in States of Emergency*, IACtHR (October 8, 1987), Advisory Opinion, Series A No 9, §§ 16 and 17.

¹²⁸⁹ D. Shelton, *supra* note 1278.

¹²⁹⁰ J. M. Pasqualucci, ‘Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law’, 38 *Stanford Journal of International Law* (2002), 241, at 280.

¹²⁹¹ The organizations submitting briefs were the Inter-American Institute on Human Rights, the International Human Rights Law Group, the International League for Human Rights & Lawyers Committee for International Human Rights, and the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law. In D. Shelton, *supra* note 1278, at 349.

practice in cases where this would assist the tribunal “in carrying out its functions.”¹²⁹² In 1991, the Rules of Procedure were updated to include an explicit authorization to accept *amicus* briefs concerning advisory matters,¹²⁹³ allowing human rights organizations to play a more active role in the proceedings.¹²⁹⁴

The liberties that the Court has taken in terms of types of cases to accept and types of arguments to consider has imparted upon it real potential to use its advisory function to interpret the law in a progressive way. In 1994, the Commission requested an advisory opinion from the Court regarding Peru’s domestic law.¹²⁹⁵ The Court issued an advisory opinion—International Responsibility for the Promulgation and Enforcement of Laws—in which it held that the Commission had the right to request an advisory opinion under Article 64 because it is part of the Commission’s function to consult with member states to ensure their domestic laws comply with the American Convention.¹²⁹⁶

Advisory opinions of the IACtHR offer a great possibility to promote human rights in the region. By interpreting its jurisdiction broadly, the Court has even been able to discuss the application of human rights in countries in the Americas that have not accepted the contentious jurisdiction of the Court.¹²⁹⁷ “[I]f the opinion only encompassed those OAS Member States that are parties to the American Convention, the Court would be providing its advisory services to a limited number of American States, which would not be in the general interest of the request.”¹²⁹⁸

¹²⁹² T. Buergenthal, ‘The Advisory Practice of the Inter-American Human Rights Court’, 79 *AM. J. INT’L L.* 1, 15 (1985). Concerning contentious proceeding Article 34 states: “[t]he Court may, at the request of a party or the delegates of the Commission, or *proprio motu*, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function.” Rules of Procedure of the Inter-American Court of Human Rights, Article 34(1) and Article 53 stated that “[w]hen the circumstances require, the Court may apply any of the Rules governing contentious proceedings to advisory proceedings.” IACtHR, Rules of Procedure.

¹²⁹³ IACtHR, Rules of Procedure, Art. 54 (3).

¹²⁹⁴ D. Shelton, *supra* note 1278.

¹²⁹⁵ *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, IACtHR (December 9, 1994), Advisory Opinion, Series A No 14, § 12.

¹²⁹⁶ *Ibid.*, § 25.

¹²⁹⁷ See for instance the US in *Advisory Opinion on Undocumented Migrants*, *supra* note 616.

¹²⁹⁸ *Ibid.*, § 59.

For instance, in its advisory opinion on Restrictions to the Death Penalty,¹²⁹⁹ the Court accepted the Commission's request even though Guatemala had not yet accepted the IACtHR's contentious jurisdiction¹³⁰⁰ because its opinion would provide assistance to the Commission in performing its functions under Article 112 of the OAS Charter.¹³⁰¹ The objective of the Court, as it explains, is to offer "an alternate judicial method of consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism [...] associated with the contentious judicial process."¹³⁰²

Some critics have spoken out against the Court's practices, asserting that the Court has interfered with state sovereignty.¹³⁰³ For instance, states consider unfair that the Commission can request an advisory opinion from the Court on a legal issue in dispute with a state that is not party to the American Convention.¹³⁰⁴ However, the Court is conscious of possible problems with its advisory function which "might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention or [...] might adversely affect the interests of the victim of the human rights violations."¹³⁰⁵ It is because of these potential issues that the Court maintains its advisory function as discretionary rather than mandatory.

¹²⁹⁹ *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, IACtHR (September 8, 1983), Advisory Opinion OC-3/83, Series A No. 3, § 43 [hereinafter *Advisory Opinion on Restrictions to the Death Penalty*].

¹³⁰⁰ *Ibid.*, § 37. Guatemala recognizes the jurisdiction of the Inter-American Court of Human Rights on March 9, 1987, OAS, Department of International Law, ACHR, signatories and ratifications.

¹³⁰¹ *Ibid.*

¹³⁰² *Ibid.*, § 43.

¹³⁰³ J. Calidonio Schmid, *supra* note 1284, at 416.

¹³⁰⁴ In the Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws, the Commission asked the Court for an advisory opinion when the state broadened application of its death penalty. Peru expressed its discontent, arguing that under Article 64(2) of the IACHR, only those states "whose domestic laws are at issue, are empowered to resort to the Court's advisory jurisdiction when there is a perceived incompatibility between one of their domestic norms and the Convention." Thus, when the Commission requested an advisory opinion, it encroached on the state's right to request an advisory opinion in regard to its domestic law. However, the Court held that the Commission could request an advisory opinion under Article 64 because the Commission had the function of consulting with member states on how to ensure their domestic laws comply with the American Convention. See *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, *supra* note 1295, § 12; See also J. M. Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' *supra* note 1290, at 254; and J. Calidonio Schmid, *supra* note 1284, at 424.

¹³⁰⁵ *Advisory Opinion on Restrictions to the Death Penalty*, *supra* note 1299, § 36 (quoting the *Advisory Opinion on 'Other Treaties'*, *supra* note 1280).

The Court “does not have the authority under its advisory jurisdiction to order judicial sanctions or impose duties or obligations on any state.”¹³⁰⁶ The objective of its advisory function is to encourage, rather than compel, a course of action.¹³⁰⁷ An interpretation by the Court of the Convention would be an explanation to states parties to the ACHR of how they must respect or implement the Convention. The use of examples

allow[s] the Court to show that its advisory opinion is not mere academic speculation and is justified by its potential benefit for the international protection of human rights [...] the Court acts as a human rights tribunal, guided by the international instruments that regulate its advisory competence and makes a strictly juridical analysis of the questions submitted to it.¹³⁰⁸

As Judge Buergenthal stated: “an advisory opinion [...] does not stigmatize a government as a violator of human rights [...] however, it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations.”¹³⁰⁹ The advisory opinion of the Court on the Rights of the Undocumented Migrants offers a concrete example. The Court interpreted the United States’ obligations under the International Covenant of Civil and Political Rights, which has been signed and ratified by the US and is binding.¹³¹⁰ The Court held:

that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.¹³¹¹

In other word, even though the US has not accepted the competence of the IACtHR the Court’s advisory opinion could be considered binding to the US, because the content of the opinion applies to US.

¹³⁰⁶ J. M. Pasqualucci, ‘Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law’ *supra* note 1290, at 246, quoting M. O. Hudson, *The Permanent Court of International Justice, 1920-1942*, at 512 (1943).

¹³⁰⁷ L. Heffernan, ‘The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice’, 28 *Stetson Law Review* (1998), 133, at 139.

¹³⁰⁸ *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 65.

¹³⁰⁹ T. Buergenthal, *The Inter-American Court, Human Rights and the OAS*, 7 *HuM. RTS. L. J.* (1986) 157, 159.

¹³¹⁰ *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 60.

¹³¹¹ *Ibid.*

The advisory jurisdiction of the IACtHR allows a better understanding of the present states' obligations under the ACHR and international law in the Americas. The Court has been able to use this function in a broad way to promote human rights in the region.¹³¹² The advisory function also has the benefit of providing the opportunity for existing obligations to be interpreted in regards to new phenomena; in that way, it can be used to anticipate possible violations of human rights and inform states about their obligations in an ever-changing landscape.

10.1.2 States' obligation to adopt domestic measures

Chapter Three of this work identified several general states' obligations within the Inter-American System of Human Rights. These obligations are the duties to prevent, investigate (effectively), prosecute, and punish any party responsible for human rights violations within the System's jurisdiction. Another state obligation included in the American Convention, less general but significant concerning potential development of PMSCs' regulation, is the obligation to adopt internal measures in order to ensure the rights protected by the ACHR.

Article 2 of the American Convention states:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.¹³¹³

In other words, states have the obligation to implement or modify domestic legislation in the event of insufficient legislation or a legal vacuum.¹³¹⁴ The Court explained this obligation in the case of *Castillo Petruzzi v. Peru*:

¹³¹² “[I]t is important to mention that the United Nations has also contributed to the international protection of Human Rights in the Americas. The Human Rights Committee is particularly relevant in this case, principally for its important decisions regarding cases in Latin America, via its complaint mechanism and its periodic country reports”. In J. E. Mendez and J. Mariezcurrena, ‘Human Rights in Latin America and the Caribbean: a Regional Perspective’, Human Rights and Human Development Occasional Paper (2000).

¹³¹³ ACHR, Art. 2. (Domestic Legal Effects)

¹³¹⁴ H. Tigroudja and I. K. Panoussis, *supra* note 241, at 172.

[t]he general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees.¹³¹⁵

As it has done in the *Castillo Petruzzi v. Peru* case, the IACtHR is accustomed to intervening at the domestic level.¹³¹⁶ It evaluates measures taken by the executive power in some countries or analyzes the nature of laws adopted by the legislature. “The Court is somewhat paternalistic and guides the State in its choice of methods to effectively fight violations”; for instance, it has assessed the quality of the investigations that states have carried out regarding human rights violations.¹³¹⁷

The Court has interpreted Article 2 to allow itself to analyze the conformity of domestic legislation with the American Convention. “Acting somewhat like a constitutional court, the Inter-American Court seizes the opportunity of contentious control to scrutinize national legislation, including constitutional law and, if necessary, to declare it incompatible with the *Convention*, thus forcing the State to amend it.”¹³¹⁸ For instance, in *Barrios Altos v. Peru*, the Court declared amnesty laws incompatible with the Convention.¹³¹⁹

Nevertheless, the Court has defined its own limits, stating that its contentious jurisdiction is not made to resolve abstract questions.¹³²⁰ Based on this statement, the Court accepted Nicaragua’s objection to the Commission’s request that the Court find two Nicaraguan national laws incompatible with the American Convention, because the request was not related to the case.

“Contentious jurisdiction is intended to resolve specific cases where it may be alleged that an act of a State carried out against certain individuals is contrary to the Convention.”¹³²¹ The

¹³¹⁵ *Case of Castillo Petruzzi et al v Peru*, IACtHR (May 30, 1999), Series C, No 52, § 207.

¹³¹⁶ L. Hennebel, *supra* note 525, at 72.

¹³¹⁷ *Ibid.*, at 73

¹³¹⁸ *Ibid.* Emphasis in the original.

¹³¹⁹ *Case of Barrios Altos Case v Peru*, IACtHR (2001), Series C No 75, § 41.

¹³²⁰ *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, *supra* note 1295, § 49.

¹³²¹ *Case of Genie Lacayo v Nicaragua*, IACtHR (January 27, 1995), Series C, No 21, § 40.

advisory function may be able to play this role. As discussed above, a member state of the OAS may request from the Court an advisory opinion “regarding the compatibility of any of its domestic laws” with the Convention or other human rights treaties.¹³²² The Court interprets the notion of “national legislation” widely to include all types of legal norms and constitutional measures.¹³²³ Similarly, governments can directly ask the Court to review their “draft legislation.”¹³²⁴ The metes and bounds that the Court has established regarding its advisory function make sense given the Court’s overarching purpose: to support states “to ensure that they respect their international human rights obligations.”¹³²⁵

This function of revising the compatibility of domestic legislation with the American Convention, either through the Court’s litigious or consultative function, is a key element for improving PMSCs’ regulation in the region. The Court can also help states in the region create the appropriate legislation concerning the phenomenon of the privatization of security.

10.1.3 Urgent measures

In addition to its advisory function, another tool at the disposal of the Inter-American system is urgent measures. There are two kinds of urgent measures: provisional measures, which can be issued by the Court, and precautionary measures, which can be issued by the Commission.¹³²⁶ Although (or because) urgent measures are not necessarily related to cases pending before the Commission or Court, they can be useful concerning the PMSC phenomenon in the Americas—not directly for improving their regulation, but to prevent violations of human rights related to or resulting from their activities.

¹³²² ACHR, Art. 64 (2). Under its advisory jurisdiction, “the Court does not exercise any fact-finding functions; instead, it is called upon to render opinions interpreting legal norms. Here the Court fulfills a consultative function through opinions that ‘lack the same binding force that attaches to decisions in contentious cases.’” *Advisory Opinion on Restrictions to the Death Penalty*, *supra* note 1299, § 32 (quoting *Advisory Opinion on ‘Other Treaties’*, *supra* note 1280, § 51). See the above the part on Advisory Opinion.

¹³²³ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, *supra* note 1277, § 14. See also *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, IACtHR (December 6, 1991), Advisory Opinion, Series A No 12, §. 16.

¹³²⁴ *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, *ibid.*, §§ 20-22.

¹³²⁵ L. Hennebel, *supra* note 525, at 73.

¹³²⁶ The AComHR grants precautionary measures based on Article 25 of its rules of procedure, while the IACtHR grants provisional measures based on Article 63(2) of the ACHR.

The American Convention anticipates the use of provisional measures by the Court.¹³²⁷ Indeed, the inclusion of provisional measures in the Convention itself—not in the rules of procedure, as is the case for the European Court of Human Rights—“is crucial at the moment to determine the legal value of the provisional measures.”¹³²⁸ Article 63(2) of the American Convention states that

[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.¹³²⁹

Since the beginning of its work, the Court has considered that provisional measures “are essential not only in the proper processes, but also in proceedings in which the legitimate rights or interests of persons are discussed.”¹³³⁰ “The objective is not only to maintain the status quo in waiting for the authority’s results, but to effectively protect human rights.”¹³³¹

In the majority of instances, the Court has ordered provisional measures to protect fundamental rights, such as right to life and right to physical integrity.¹³³² Nevertheless, more recently the Court has expanded the range of rights it is willing to protect through a grant of provisional measures.¹³³³ In the case of *Comunidades de Paz de San José de Apartado* (Peace

¹³²⁷ ACHR, Art. 63 § 2.

¹³²⁸ J. Méndez and A. Dulitzky, ‘Medidas Cautelares y Provisionales’, in C. Courtis, D. Hauser, and G. Rodríguez Huerta, (ed) *Protección Internacional de Derechos Humanos: Nuevos Desafíos* (México: Porrúa-ITAM, 2005) 67-93, at 75. Author’s translation.

¹³²⁹ ACHR, Art. 63 § 2.

¹³³⁰ IACtHR, Series E: Medidas Provisionales, Compendio 1987 -1996 n°1, Prologo del Presidente de la Corte, Dr. Hector Fix Zamudio. In J. Méndez and A. Dulitzky, ‘Medidas Cautelares y Provisionales’, 2 (1) *Revista Argentina de Derechos Humanos* (2004) at 116. Author’s translation (“[las medidas provisionales] son indispensables no solo en los procesos propiamente dichos, sino inclusive en procedimientos en los cuales se discuten los derechos o intereses legítimos de las personas”).

¹³³¹ L. Hennebel, *supra* note 525, at 83. The basis for this position is the “need to establish the situation that should prevail during the processing to avoid the irreparable completion of the violations of these rights and interests.” in IACtHR, Series E: Medidas Provisionales, Compendio 1987 -1996 n°1, Prologo del Presidente de la Corte, Dr. Hector Fix Zamudio. Author’s translation (“ya que es necesario establecer la situación que debe prevalecer durante el trámite para evitar que se consumen de manera irreparable las violaciones a dichos derechos e intereses”).

¹³³² J. Méndez and A. Dulitzky, *supra* note 1328, at 75.

¹³³³ See for instance the *Case of Haitian in the Dominican Republic*, IACtHR (June 8, August 7 and 18, and November 12, 2000) Order, Provisional Measures, Series E; *Case of Peace Community of San José de Apartadó (Colombia)*, IACtHR (June 18, 2002) Order, Provisional Measures, Series E; *Case of the newspaper La Nación*

Community of San José de Apartado), for instance, the Court required the state to guarantee the necessary conditions for community members to be able to return to their homes, thereby protecting the right to residency.¹³³⁴ In another set of provisional measures, the Court protected freedom of expression by ordering that a Costa Rican decision against a newspaper be suspended.¹³³⁵ In some cases the Court has also extended the benefit of provisional measures to particular groups, such as individual communities or specific parts of the population.¹³³⁶

Although the American Convention does not expressly allow the Commission to order urgent measures, the Commission has been proactive in requesting that the Court order them.¹³³⁷ The Commission started participating by requesting that the Court issue provisional measures during the pendency of a contentious case before the Court.¹³³⁸ Later, the Commission also started requesting these measures in cases not yet submitted to the Court.¹³³⁹

In addition to its active role in the Court's provisional measures, the Commission has also developed its own urgent measures: the precautionary measures. These were institutionalized in 1980 when they were incorporated into the Commission's Rules of Procedure, but the Commission "had been exercising such function since long before, both in relation to and in the absence of cases pending before it."¹³⁴⁰

(Costa Rica), IACtHR (September 7, 2001) Order, Provisional Measures, Series E. See also J. Méndez and A. Dulitzky, *supra* note 1328, at 73-74.

¹³³⁴ *Case of Peace Community of San José de Apartadó (Colombia)*, *Ibid.* See J. Méndez and A. Dulitzky, *supra* note 1328, at 74.

¹³³⁵ *Case of the newspaper La Nación (Costa Rica)*, *supra* note 1333.

¹³³⁶ Referring to communities: *Case of Peace Community of San José de Apartadó (Colombia)*, IACtHR (November 18, 2000) Order, Provisional Measures, Series E, § 35; on specific part of the population: *Case of Urso Branco Prison (Brazil)*, IACtHR (June 18, 2002), Order, Provisional Measures, Series E, § 25.

¹³³⁷ J. M. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization', 38 *Vanderbilt journal of Transnational Law* (2005), 1-49.

¹³³⁸ F. González, 'Urgent Measures in the Inter-American Human Rights System', 7 (13) *Sur - International Journal on Human Rights* (December 2010), 51-75, at 51.

¹³³⁹ See for instance the *Case of Chumimá (Guatemala)* IComHR (August 1, 1991) Resolution. Urgent measures do not need to be related to a pending case: "Urgent measures in the Inter-American System are usually related to cases pending before the Commission or Court, this is not necessarily always the case, given that they are not, *stricto sensu*, part of the contentious jurisdiction of the organs in charge of protecting rights within that system." In F. González, *supra* note 1338, at 51.

¹³⁴⁰ F. González, *Ibid.*, at 52. See also Rules of Procedure of the IAComHR, Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1, 2013.

The Commission has also been creative in the precautionary measures that it adopts.¹³⁴¹ Similar to the Court, it has ordered measures related to rights to life and to physical integrity on several occasions,¹³⁴² but it has also adopted precautionary measures to protect an ample variety of rights—for example, freedom of movement and residency,¹³⁴³ right to property,¹³⁴⁴ and right to education.¹³⁴⁵

The urgent measures available in the Inter-American System of Human Rights may have a positive effect of preventing or stopping human rights violations.¹³⁴⁶ Even though they do not necessarily resolve the problems posed by PMSCs or provide a mechanism to improve PMSCs' regulation, they represent an important advantage for the System as they present an opportunity for either organ to order countries to limit PMSCs' use until PMSCs are effectively regulated.

10.2 The Inter-American System of Human Rights' tools developed by interpretation

The Commission and the Court have, on several opportunities, interpreted their own rights and duties, often extending their power and sometimes against state will. The progressive method of interpretation—discussed below—has given rise to “interpreted tools” available in the

¹³⁴¹ J. Méndez and A. Dulitzky, *supra* note 1328, at 82.

¹³⁴² *Case of Calvin Manolo Galindo and his family, and Marcos Anibal Sanchez and his family (Guatemala)*, IAComHR (September 24, 1999), Precautionary Measures.

¹³⁴³ See for instance: *Case of Josefina Juana vda de Pichardo (Dominican Republic)*, IAComHR (July 13, 1996), Precautionary Measures; *Case of Gustavo Gorriti Ellenbogen (Panama)*, IAComHR (August 18, 1997), Precautionary Measures.

¹³⁴⁴ *Case of Baruch Ivcher Bronstein (Peru)*, IAComHR (July 30, 1997), Precautionary Measures; *Case of Bartolo Ortiz, Carlos Orellana and Alejandra Mahus (Chile)*, IAComHR (July 18, 1999), Precautionary Measures.

¹³⁴⁵ *Case of Eddy Martinez et al. (Dominican Republic)*, IAComHR (December 3, 1999), Precautionary Measures.

¹³⁴⁶ This is, at least, the objective, as there is a “need to establish the situation that should prevail during the processing to avoid the irreparable completion of the violations of these rights and interests.” in IACtHR, Series E: Medidas Provisionales, Compendio 1987 -1996 n°1, Prologo del Presidente de la Corte, Dr. Hector Fix Zamudio. Author's translation (“ya que es necesario establecer la situacion que debe prevalecer durante el tramite para evitar que se consumen de manera irreparable las violaciones a dichos derechos e intereses”).

Inter-American System of Human Rights, such as the possibility of using external sources to interpret the American Convention.

10.2.1 Technique of interpretation

As mentioned earlier, the Court focuses on the human being, particularly defending the vulnerable.¹³⁴⁷ To protect the best interests of vulnerable populations, the Court has identified a special need for protection.¹³⁴⁸ The Court defined rights and freedoms according to its subject.¹³⁴⁹ For instance, the Court defines the right to property as a protection of collective property for indigenous communities;¹³⁵⁰ the concept of family is extended in polygamous communities;¹³⁵¹ and “life projects” is included in the rights of the child.¹³⁵²

In order to accomplish the protection of the vulnerable, the Court uses a progressive method of interpretation that considers the American Convention in light of current realities. The Court recognizes the dynamic nature of rights contained in the American Convention and considers that the integrity of the system is preserved if the interpretation is not only based on the terminology of the treaty but if it is situated in its context.¹³⁵³ In this way, it does not result “in a deterioration in the protection system embodied in the Convention.”¹³⁵⁴ The Court repeatedly explained its method of interpretation:

the corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up

¹³⁴⁷ L. Hennebel, *supra* note 525, at 62.

¹³⁴⁸ *Ibid.*, at 64.

¹³⁴⁹ *Ibid.*

¹³⁵⁰ *Case of Indígena Yakye Axa Community v. Paraguay*, IACtHR (June 17, 2005), Series C No 125, at § 8.

¹³⁵¹ *Case of Aloeboetoe et al. v Suriname*, IACtHR (December 4, 1991), Series C No. 11, § 59.

¹³⁵² *Case of Villagrán Morales v Guatemala*, IACtHR (November 29, 1999), Series C, No. 63, § 59, 79.

¹³⁵³ The Court notes: “although the text appears literally clear, it must be analyzed applying all the elements that comprise the rule of interpretation of Article 31 of the Vienna Convention.” *Case of González et al. (Cotton Field) v Mexico*, IACtHR (November 26, 2009), Series C No 205, §42. Article 31 of the Vienna Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹³⁵⁴ *Case of González et al. (Cotton Field) v Mexico*, *Ibid.*, § 42.

the latter's faculty for regulating relations between States and the individuals within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the individual in contemporary international law.¹³⁵⁵

In its most recent advisory opinion, the Court responded to Mexico's request for an opinion on the status of undocumented workers under international law.¹³⁵⁶ The Court unanimously stated that every migrant worker is entitled to non-discrimination and equality before the law, as well as to due process, regardless of migratory status.¹³⁵⁷ This "decision marked the first time that a human rights tribunal has designated nondiscrimination a *jus cogens* norm giving rise to obligations *erga omnes*."¹³⁵⁸ Thus, the advisory opinion of the IACtHR granted unauthorized workers rights that extended beyond pre-existing interpretations of international law.¹³⁵⁹

Even though the Court's progressive approach raises some issues,¹³⁶⁰ it permits an interpretation of existing states' obligations in light of new phenomena. The obligation of non-discrimination is not new, but the Court gave it the "status" of *erga omnes* and applied it to a contemporary phenomenon.

The Court quoted the International Court of Justice in the case *Anglo-Iranian Oil Company* which says: "[i]t cannot base its arguments on a strictly grammatical interpretation of the text. [The Court] shall seek an interpretation that is in harmony with the natural and reasonable way

¹³⁵⁵ *Case of the Ituango Massacres v Colombia*, IACtHR (July 1, 2006), Series C No. 148, § 157 (note 177); *Case of Yakye Axa Indigenous Community*, *supra* note 1350, § 67; *Advisory Opinion on Undocumented Migrants*, *supra* note 616, § 120.

¹³⁵⁶ A year before the Mexican government requested the IACtHR for an opinion on the status of undocumented workers under international law, the US Supreme Court delivered a judgment in which it refused to grant compensation for an undocumented Mexican worker. By doing so, the Court excluded earnings social rights granted to other workers migrant workers, saying the contrary would have the effect of encouraging illegal immigration to the United States. The Mexican government considered the US decision to promote discriminatory treatment of undocumented workers and endanger respect for human rights in the region. *Advisory Opinion on Undocumented Migrants*, *supra* note 616.

¹³⁵⁷ *Advisory Opinion on Undocumented Migrants*, *supra* note 616, §§ 119, 121.

¹³⁵⁸ B. Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Worker's Rights for the Hemisphere: A Comment on Advisory Opinion 18', 28 *N.Y.U. Review of Law and Change* (2004) 547, at 586-87.

¹³⁵⁹ *Ibid.*, at 591.

¹³⁶⁰ Calidonio Schmid argued that the IACtHR's progressiveness creates issues "to the hierarchy among international courts and the enforceability of the IACHR's opinion in domestic courts," J. Calidonio Schmid, *supra* note 1284, at 551.

in which the text is read.”¹³⁶¹ Following this, the IACtHR quoted the ICJ’s advisory opinion on Namibia, which affirms that: “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹³⁶² The progressive method used by the IACtHR has the advantage of allowing the Inter-American System of Human Rights to adapt itself to new challenges that can endanger human rights, such as the privatization of security.¹³⁶³

10.2.2 External sources to interpret states’ obligations under the American Convention

Another feature of the Inter-American System of Human Rights that contributes to its *avant-gardiste* character and may be useful for improving the regulation of PMSCs at the regional level has been created by the System itself. Both the Commission and the Court have interpreted their mandates to allow themselves to use external sources to interpret the American Convention. On several occasions, the two institutions have even used soft law to construe states’ obligations under the American Convention.¹³⁶⁴ The Inter-American institutions’ openness to using a variety of external sources is promising for the regulation of PMSCs because the Montreux Document and the ICoC—instruments that many international bodies would not reference or consider—are the primary sources of guidance on PMSCs in the absence of a binding regional or international law on the subject.

The Court has examined its own method and scope of interpretation in its advisory opinion on *‘Other treaties’ Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention on Human Rights)*, in which it interpreted the phrase in the American Convention:

¹³⁶¹ *Case of Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ (July 22, 1952) Preliminary Objections.

¹³⁶² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ (1971), Advisory Opinion, § 53.

¹³⁶³ Hansbury notes that the ICJ uses this progressive method only in exceptional occasions. In E. Hansbury, *supra* note 599.

¹³⁶⁴ This practice of the Inter-American Court has no comparison in its European counterpart. The European Court is self-referential. See H. Tigroudja, ‘L’autonomie du Droit Applicable par la Cour Inter-Américaine des Droits de l’Homme: en Marge d’Arrêts et Avis Consultatifs Récents’, *Revue Trimestrielle des Droits de l’Homme* (2002).

“or of other treaties concerning the protection of human rights in the American States.”¹³⁶⁵
The Court held that “other treaties” in this sentence meant:

[A]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.¹³⁶⁶

Considering its progressive methods of interpretation, its universalist vision, and its consciousness of the need for harmonization of regional and international law, it is logical that the Court and Commission use external sources, particularly international law, to interpret the ACHR.

Since the System’s early days there has been a question of its coexistence with other systems of protection. To respond to worries, the Secretariat of the Commission undertook a study on the provisions of the UN covenants and the various Inter-American conventions and concluded that both systems could coexist:

The need for, and the desirability of, a regional convention for the Americas are based on the existence of a body of American international law built up in accordance with the specific requirements of the countries of this hemisphere. That need and desirability also follow from the close relationship that exists between human rights and regional economic development and integration, in accordance with the statements of the Chiefs of State made at the meeting in Punta del Este. Consequently the Inter-American Convention on the Protection of Human Rights should be autonomous rather than complementary to the United Nations covenants, although it should indeed be coordinated with those covenants.¹³⁶⁷

In a certain manner, the use of the external sources responds to these concerns by “allow[ing] the Court to practically reaffirm its universalist conception of international human rights law.”¹³⁶⁸

The Court first referenced external sources in *Velásquez-Rodríguez*, when it cited to the Human Rights Committee views on Indemnification for human rights violations.¹³⁶⁹ Since this

¹³⁶⁵ See ACHR Art. 64; See also *Advisory Opinion on ‘Other Treaties’*, *supra* note 1280.

¹³⁶⁶ *Advisory Opinion on ‘Other Treaties’*, *Ibid.*, § 52.

¹³⁶⁷ *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Draft*, IAComHR, (1968) OAS Doc. OEA/Ser.L/II.19, doc. 26.

¹³⁶⁸ L. Hennebel, *supra* note 525, at 94.

early foray into the use of external sources to interpret the Convention, the Commission and Court have repeatedly sought guidance in sources ranging from international conventions to soft law instruments. On several occasions, the Inter-American institutions have referenced non-Inter-American international law instruments to inform their interpretation of the American Convention. This practice has occurred frequently enough in the area of IHL that it is accepted that the Court “makes room for extending its competence to assessing IHL concerns.”¹³⁷⁰

However, the Court has limited its and the Commission’s capacity to directly interpret IHL.¹³⁷¹ In *La Tableta Case*, the Commission suggested that it could interpret directly IHL.¹³⁷² Rather than referencing the Geneva Conventions and its Additional Protocols to interpret the Convention, the Commission issued an opinion directly addressing violations of IHL—more specifically, declaring that Colombia had violated Common Article 3.¹³⁷³ The Court subsequently, in the *Case of Las Palmeras*, rectified the Commission’s misinterpretation, holding that neither the Commission nor the Court was competent to determine whether a rule of IHL had been breached; rather, these bodies could use Common Article 3 in interpreting the reach of the American Convention. The Court revisited the issue of the use of external sources a few years later in the *Case of Bámaca-Velásquez v. Guatemala*, reaffirming its position:

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the

¹³⁶⁹ *Case of Velásquez Rodríguez v Honduras*, *supra* note 220, § 28.

¹³⁷⁰ L. Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’, 21 (3) *EJIL* (2010). See also H. Tigroudja, ‘The Inter-American Court of Human Rights and international humanitarian law’, in R. Kolb and G. Gaggioli, (eds), *supra* note 370, 466-479.

¹³⁷¹ *Case of Bámaca-Velásquez v Guatemala*, *supra* note 1020, §§ 208–09.

¹³⁷² *Case of Juan Carlos Abella v Argentina*, IACoHR (October 30, 1999), Case No. 11.137, Report No. 55/97. This case concerned an attack launched by a group of forty-two armed persons on Argentinian national armed forces barrack in 1989 at La Tablada, Argentina. The attack ended after approximately thirty hours resulting in the deaths of twenty-nine of the attackers, as well as several state agents. The surviving attackers filed a complaint with the Commission alleging violations by state agents of the American Convention on Human Rights and of rules of international humanitarian law. The Commission examined in detail whether it was competent to apply IHL directly. See more details in L. Zegveld, ‘The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case’, 324 *International Review of the Red Cross* (1998).

¹³⁷³ *Case of Juan Carlos Abella v Argentina*, *Ibid.*

individual, such as the 1949 Geneva Conventions and, in particular, Common Article 3. Indeed, there is a similarity between the content of Article 3, Common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.¹³⁷⁴

However, the American Convention “has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself and not with the 1949 Geneva Conventions.”¹³⁷⁵ Indeed, the Court used IHL to interpret the substance and the scope of the American Convention in armed conflict in accordance with Article 29(b) of the American Convention,¹³⁷⁶ And in the *Case of Mapiripán Massacre v. Colombia*, the Court referred to Common Article 3, as well as Additional Protocol II.¹³⁷⁷ Similarly, in the *Case of the Ituango Massacres v. Colombia*, the Court interpreted the freedoms of movement, property, and private and family life in light of IHL.¹³⁷⁸

Another instance in which the Court referenced an international convention was in its decision on the extrajudicial execution of Guatemalan street children.¹³⁷⁹ In the *Case of Villagrán Morales v. Guatemala*, the Court considered Article 19 of the Convention, which vaguely defines the protection of children, stating: “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State.”¹³⁸⁰ The Court chose to use the Convention on the Rights of the Child (CRC) to further interpret the states’ obligations to protect children, holding that

¹³⁷⁴ *Case of Bámaca-Velásquez v. Guatemala*, *supra* note 1020, §§ 208–09.

¹³⁷⁵ *Case of Las Palmeras v. Colombia*, IACtHR (2001) Series C No. 90, § 33.

¹³⁷⁶ ACHR, Art. 29. Restrictions regarding interpretation: “No provision of this Convention shall be interpreted as: [...] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

¹³⁷⁷ *Case of the Mapiripán Massacre v. Colombia*, *supra* note 27, § 114.

¹³⁷⁸ *Case of the Ituango Massacres v. Colombia*, IACtHR (July 1, 2006), Series C No. 148, §§ 201–235 (freedom of movement), §§ 169–200 (property, and private and family life). See also: *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operación Génesis) v. Colombia*, *supra* note 652, §§ 221, 349, 352, and 353.

¹³⁷⁹ *Case of Villagrán Morales v. Guatemala*, *supra* note 1352, §§ 59–79.

¹³⁸⁰ ACHR, Art. 19.

[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.¹³⁸¹

In addition to international conventions, another external source that is frequently referenced in Inter-American jurisprudence is the European Court of Human Rights.¹³⁸² For instance, in the *Case of Castillo Petruzzi*, the Court needed to interpret Article 7 (right to personal liberty) of the American Convention to define the right to be judged in a reasonable time, and sought guidance in the ECHR cases *Brogan et al v. United Kingdom* and *Barbera Mességué and Jobardo v. Spain*.¹³⁸³

The Court has also used external sources to define torture, referring to the ECHR's case law and to a Human Rights Committee case to explain that there is a "veritable international legal regime of absolute prohibition of all forms of torture."¹³⁸⁴ Similarly, the Court and the Commission have often referenced the Inter-American Convention for the Prevention and Repression of Torture and the United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.¹³⁸⁵ In the *Paniagua Morales Case*, the Court found that Guatemala had breached both the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture.¹³⁸⁶

¹³⁸¹ *Case of Villagrán Morales v Guatemala*, *supra* note 1352, § 194.

¹³⁸² See for instance, H. Tigroudja, 'L'autonomie du Droit Applicable par la Cour Inter-Américaine des Droits de l'Homme: en Marge d'Arrêts et Avis Consultatifs Récents', *supra* note 1364.

¹³⁸³ *Case of Castillo Petruzzi et al v Peru*, *supra* note 1315, § 54 and § 135. European cases: *Case of Brogan et al v. United Kingdom*, ECtHR (1988) Series A, No. 145-B, 11 EHRR 117; *Case of Barbera Mességué and Jobardo v. Spain*, ECtHR (December 6, 1988) (Application no. 10590/83).

¹³⁸⁴ The IACtHR referred to the ECHR to define torture in the *Case of Cantoral Benavides v Perú*; the IACtHR referred to the *Case of Selmouni v France*, ECHR (1999), Appl No 25803/94, § 101; *Case of Campbell v Cosans*, ECHR (1982), Appl No 7511/76, § 26; and the *Case of Soering v United Kingdom*, ECHR (1978), Appl No 14038/88, §§ 110 - 111. In the same case, The IACtHR also referred to the *Case of Miguel Angel Estrella v. Uruguay*, Human Rights Committee (March 29, 1983) No. 74/1980, §§ 6, 8 and 10. See *Case of Cantoral Benavides v Perú*, IACtHR (August 18, 2000) Series C, No 69 § 102.

¹³⁸⁵ See for instance: *Case of Gómez-Paquiyaui Brothers*, *supra* note 310; *Case of Maritza Urrutia v Guatemala*, *supra* note 664; *Case of Cantoral Benavides v Perú*, *Ibid.*, § 26; *Case of Villagrán Morales v Guatemala*, *supra* note 1352. See also *Case of Jailton Neri da Fonseca v. Brazil*, IAComHR (2004), No. 33/04, § 63. See also Inter-American Convention to Prevent and Punish Torture, OAS (September 12, 1985) (entered into force February 28, 1987); United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res.39/46 (1984).

¹³⁸⁶ *Case of Paniagua Morales v Guatemala*, *supra* note 242.

Furthermore the Court's use of external sources is not limited to only a few topics—it has employed this technique to define a range of rights and obligations, including freedom of movement,¹³⁸⁷ the extent of the right to a fair trial,¹³⁸⁸ and to determine the possible restrictions on freedom of expression.¹³⁸⁹ In several of those cases, referring to external sources appears as a method of persuasion, authority, and legitimacy:

By referring to European and universal systems, the Court emphasizes the convergence of jurisprudence in order to reinforce the authority but also the legitimacy, of its decisions for it essentially cites the Strasbourg Court which occupies a historic central role (whose authority or legitimacy is undisputed) in this subject, and the *International Covenant's* protection body which, as a UN authority, may also lay claim to a certain degree of legitimacy and authority.¹³⁹⁰

The final type of external source that the Commission and Court use—and the most important type in the context of the regulation of PMSCs—is soft law. After *Villagrán-Morales*, the Court in a subsequent children's rights case cited to the Beijing Rules¹³⁹¹ and Riyadh Guidelines—two relevant soft law instruments—¹³⁹² leading an author to observe:

[t]he rapid incorporation of blocks of global hard and soft law into the regional convention spares the Court considerable effort in working out and justifying the consequences of Article 19, and demands major improvements in the conditions suffered by impoverished children in the Americas [...]. The formulations contained in soft law might turn out to coincide with the most convincing suprapositive analysis of children's human rights, but the bare appearance of a proposition in a UN resolution or an expert body's recommendation does not ipso facto carry conclusive normative force. Thus, the importation of soft law standards more likely results from pragmatic, institutional considerations.¹³⁹³

¹³⁸⁷ *Moiwana Community Case v Suriname*, IACtHR (2005), Series C, No. 124, § 107. As follow: “a court has the duty to apply all appropriate legal standards—even when not expressly invoked by the parties—in the understanding that those parties have had the opportunity to express their respective positions with regard to the relevant facts.”

¹³⁸⁸ *Case of Tibi v Ecuador*, *supra* note 664, § 186.

¹³⁸⁹ *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Arts.13 and 29 American Convention on Human Rights)*, IACtHR (1985), Advisory Opinion, Series A No.5, § 46.

¹³⁹⁰ L. Hennebel, *supra* note 525, at 94.

¹³⁹¹ UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985), in *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-American Court of Human Rights, Series A, No. 17 (2002), § 120.

¹³⁹² UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), adopted by GA Res 45/112, December 14, 1990; in *Juridical Condition and Human Rights of the Child*, IACtHR (2002), Advisory Opinion, Series A No. 17, § 111.

¹³⁹³ G. L. Neuman, *supra* note 26.

The IACtHR's use of soft law as an external source to interpret the American Convention has not been reserved to the topic of children's rights and, in fact, is part of the Court's common practice. In the *Tibi Case*, for instance, the Court referred several times to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in order to find that Article 5 of the American Convention, which protects the right to humane treatment, requires the state to provide adequate and timely treatment of injuries suffered by prisoners.¹³⁹⁴ In the *Juan Humberto Sánchez Case*, the Court similarly used the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions¹³⁹⁵ to define the minimum requirements for a serious and effective investigation required by Article 8 of the American Convention.¹³⁹⁶ In other cases, the Court has even referred to guidelines and standards adopted by private organizations.¹³⁹⁷

To a certain extent, the effect of using external sources to interpret the American Convention serves to convert global soft law into regional hard law:¹³⁹⁸ “[m]ore precise and elaborate standards articulated through non-binding UN-based processes supply content to give effect to less determinate but binding Convention norms. They become subsidiary inter-American obligations, and failure to fulfil them results in a violation of the Convention.”¹³⁹⁹

The practice of referencing external sources may be especially useful at the moment of the emergence of a new phenomenon—the increased use of private security, for example. Especially in the absence of hard law, soft law provides guidance to help the Inter-American institutions, states in the region, and other stakeholders understand the new phenomenon, its potential impacts, and ways of managing those impacts. As mentioned above, the Court has rejected a historical approach of interpretation and uses a progressive technique of

¹³⁹⁴ Adopted by GA Res. 43/173, December 9, 1988. In *Case of Tibi v Ecuador*, *supra* note 664, § 154.

¹³⁹⁵ UN Doc E/ST/CSDHA/.12 (1991).

¹³⁹⁶ *Case of Juan Humberto Sánchez v Honduras*, IACtHR (November 26, 2003), Series C, No. 99, § 127

¹³⁹⁷ *Case of Ximenes-Lopes v Brazil*, *supra* note 611, § 130 (note 117), § 133 (note 118), § 135 (note 120) (citing standards adopted by the World Psychiatric Association, the American Hospital Association, the American Geriatrics Society, and the American Medical Association). See also *Case of Zambrano-Vélez et al. v Ecuador*, *supra* note 615, § 51. Referring to the Turku Declaration: Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).

¹³⁹⁸ J. Alvarez, *International Organizations as Law-makers* (New York: Oxford University Press, 2006), at 504.

¹³⁹⁹ G. L. Neuman, *supra* note 26.

interpretation that affirms the need to interpret human rights treaties in accordance with current circumstances.¹⁴⁰⁰ Using external sources—particularly soft law—follows the same path of interpreting the American Convention with current and emerging norms.

In the context of the growing use of private security in Latin America, the Court and the Commission could use the Montreux Document, for instance, to interpret states' obligations under the American Convention. Because the customary law and best practices laid out in the Montreux Document specifically address issues raised by PMSCs, this external source may help the Inter-American institutions themselves have a clearer understanding of the challenges posed by PMSCs and applicable law, as well as provide states with more robust guidance for fulfilling their obligations. The Court and Commission's practice of using of external sources thus stands to improve regulation of PMSCs in Latin America.

¹⁴⁰⁰ See above on the interpretation methods of the Court.

Part 5: Conclusion

The point of departure for this thesis was the observation that the use of PMSCs is a growing phenomenon in Latin America and the Caribbean. They work for private individuals and enterprises across the region, as well as for governments and international organizations. The so-called “War on Drugs” has been a source for an increased use of PMSCs in Latin America and the Caribbean, as the US often outsources its military collaborations with other countries, such as Mexico and Colombia, to contractors. In addition to their part in military operations, PMSCs have also played a role in international humanitarian efforts, such as those carried out by the UN in Haiti.

Even though PMSCs are not problematic *per se*, their activities can create significant problems for human rights in the absence of an effective regulatory framework—one that consists of both regulatory instruments and regulatory institutions.

The nature of PMSCs’ work and the high levels of violence in this study’s three case studies suggest that the law of armed conflict—that is, international humanitarian law—may provide a body of law that is appropriate for regulating PMSCs. There has been an active NIAC in Colombia ongoing for approximately fifty years. In Mexico, the intensity of the violence and the organization of the parties mean that the situation meets IHL’s requirements for it to be considered a NIAC. Finally, in Haiti, the situation has evolved from an armed conflict (2003-2007) which includes two historical stages from the run-up to the 2004 election through the first year of the UN intervention (2003-2005) and the escalation of violence as a result of the rise of gangs (2004-2007), to a situation of peace with a high criminal rate before the earthquake (2007-2010), to a post-earthquake disaster situation in which criminality is rising but the intensity of the violence has not reached the level to be classified an armed conflict (2010-present). Thus, IHL has applied to Colombia, Mexico, and Haiti during part of the time periods considered here. However, PMSCs ultimately escape regulation under this body of law because companies are not subjects of IHL and the “privatization” element shields PMSCs from being considered part of the armed forces, thus protecting their treatment as civilians.

Another possible source of regulation for PMSCs is found at the domestic level in domestic laws, regulations, and institutions. Colombia boasts a national law on private security that is innovative and interesting; however, it is not implemented because of lack of capacity on the part of the regulatory institutions created under the law. Furthermore, the law is inapplicable to the multinational companies working for the United States in the framework of military cooperation—they benefit from the same immunity regime as the US personnel and are, thus, out of the reach of the Colombian justice system.

In Mexico, too, there is robust domestic legislation addressing PMSCs. And in Mexico, too, this regulation fails to achieve its objective. There is no will to implement the law as to domestically-registered PMSCs, while international PMSCs that work in Mexico have effectively evaded the law by basing themselves beyond the country's borders.

Finally, in Haiti, there is a set of presidential decrees that establish operating guidelines and regulations for PMSCs, but these regulations are not enforced. Furthermore, PMSCs working for the UN benefit from a special immunity due to their participation in the peacekeeping mission, and sadly, the UN is not effectively regulating the PMSCs either.

Given the shortcomings of IHL and domestic routes in regulating PMSCs in Latin America and the Caribbean another option must be considered. A third option is the regional level through the Inter-American System of Human Rights, which is unique to the region and is well established and well situated to help curtail human rights violations by improving regulation of PMSCs in the region. A review of the history, functions, and jurisprudence of the Inter-American System of Human Rights are illustrative of the potential role of this system to improve the regulation of PMSCs in the region. First, rooted in its development during politically repressive times, the System self-conceptualizes as a protector or defender of the vulnerable against abuses of power. Given that PMSCs, when they endanger human rights, are often standing in the shoes once filled by the state, it stands to reason that the Inter-American Commission and Court may be as willing to regulate PMSCs as they have been to hold states accountable.

Furthermore, the Court has two functions—advisory and adjudicatory—that could be used to broach and address the issue of PMSCs. The advisory function has the advantage that it provides an opportunity for the Court to extend guidance to states as to how to fulfill their obligations, without requiring a specific case that meets the Court’s requirements for being heard. Second, the Court when in its adjudicatory function can use its *avant-gardiste* techniques of interpretation to bring into play international norms, even soft law—such as the Montreux Document or the ICoC—in order to interpret states’ obligations under the American Convention.

Finally, the Inter-American System has several bodies of jurisprudence that would promote or require better regulation of PMSCs. Its commitment to protecting the vulnerable is reflected in an expansive canon of *jus cogens*. The Court has also developed a significant jurisprudence on non-state actors, holding the state responsible for their activities when they threaten respect for human rights. And this jurisprudence could be applied to PMSCs. While the Court, in its advisory function, can suggest that states adopt domestic measures or improve existing ones, the Court is able, in its decisions, to *require* states to carry out these actions. Regardless of a state’s internal situation—peace, internal tensions, or even armed conflict—the Inter-American System holds states to their obligations under the American Convention, thus illustrating the potential positive role that it could play in regulating PMSCs in the Americas.

This study demonstrates the lack of efficient PMSCs’ regulation in three important cases and illustrates the need for stronger regulation of PMSCs. Furthermore, it recalls that states have the obligation under the American Convention on Human Rights to regulate PMSCs as they represent a threat to human rights in the region. This thesis also proposes a way of improving PMSCs’ regulation by imposing certain international standards, such as the Montreux Document, on states through the Inter-American System of Human Rights. The IACtHR can refer to external sources to interpret the American Convention, and the Commission or any state member of the OAS could request that the Court address the issue of PMSCs’ regulation in the region in an advisory opinion. This could be a way to promote the Montreux Document in the region.

Nevertheless, two main limitations must be acknowledged. The first relates to the available information concerning PMSCs' activities. For this study, I undertook qualitative research on these case studies using direct observation, in-depth interviews, and analysis of documents. Overall, it is not an easy task to obtain information about PMSCs in Latin America and the Caribbean. Newspaper articles and interviews were critical for obtaining information in each country in order to piece together the puzzle of PMSCs' activities and the challenges they present in each location. The most complete information available and easiest information to obtain was about Colombia—this was a function of the extensive time I have spent in Colombia and my previous work on the case, as well as PMSCs' relatively long-standing presence there.

Unlike in Colombia, where the United States government has shared some information about the PMSCs working under Plan Colombia, there is no transparency about which PMSCs are providing services under the Merida Initiative. As a result, the amount of official information available was limited; the recency with which PMSCs began operating under the Merida Initiative likely also impacted the availability of other information. In order to supplement the limited media coverage and government resources, I relied heavily on interviews, most of which were conducted in Mexico City and Washington, DC. All told, however, the puzzle is not complete—even basic information, such as the names of US PMSCs operating in Mexico and the services they are providing, is missing. The difficulty in obtaining official information about PMSCs' operations in Mexico is concerning in and of itself because it makes it more difficult, if not impossible, to hold the companies accountable for their wrongful acts. Unfortunately, I did not have the opportunity to conduct field research in Haiti, and my main sources of information for this case study were newspapers, NGO reports, and phone interviews.

Working on sensitive issues—of which the human rights implications of security activities is an example—complicates the task of gathering information and also makes more likely that the results of the investigation will be a mere approximation of the reality, rather than a reflection of the reality. This is likely the case with this work, despite the fact that all possible precautions were taken.

The second limit of the study does not concern the analytical part, but its possible reach. The central argument of this work is that Inter-American System of Human Rights has the potential to play a positive role in the regulation of PMSCs in Latin America, and I demonstrate that it does *in theory*. However, in practice one must admit that the implementation of the decisions of the Inter-American Court and Commission is not always optimal. First, the Commission, which makes non-binding recommendations to states, found in 2009 that states have fully complied with its recommendations in only 12.5% of the cases; partially complied in 69.5% of the cases; and not complied at all in the remaining 18% of the cases.¹⁴⁰¹ The Court does not monitor compliance as the Commission does; thus, there is no similar data concerning the Court. Even without quantitative data, apparently “[o]ne of the fundamental challenges the Inter-American Human Rights system faces is the enforcement of its rulings and recommendations;”¹⁴⁰² thus, the principal limitation of this thesis is the potential lack of state compliance with an eventual IACtHR decision.

Despite these limitations on the potential impact on this study’s main thesis, it would be relevant to pursue and broaden the investigation on the use of external sources, including soft law, as a way to aid the crystallization emerging norms. A larger study within Inter-American law would be useful to assess the evolution of the external sources used by the IACtHR within the Inter-American System.

Also, on the topic of the process of creation of international law, a study on the creation of norms concerning PMSCs would be useful. Does the fact that an initiative such as the Montreux Document has more success—that is, is quicker to negotiate and receives more state support—than a UN Convention reveal a tendency in international law? While it is evident that the fact that the Montreux Document is non-binding facilitated its negotiation and endorsement, it is not the only example where the UN failed to react to an international issue

¹⁴⁰¹ *Annual Report of the Inter-American Commission on Human Rights 2009*, IAComHR (2009), OEA/Ser.L/V/II, § 61–74; See also C. Hillebrecht, ‘The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System’, 34 *Human Rights Quarterly* (2012) 960, at 962.

¹⁴⁰² C. Hillebrecht, *Ibid.*, at 962.

and a single state managed, through the use of diplomacy, to avoid the blockage of the negotiation of a potential convention at the UN level.¹⁴⁰³

Finally, further research might well be conducted on PMSCs in Latin America. Several other cases in the region would be useful to analyze; for instance, El Salvador and Guatemala pose interesting variations on the cases examined here because the actors are not as well organized as in Mexico but sources suggest that US PMSCs working there are more active and heavily armed.¹⁴⁰⁴ More generally, PMSCs working in the War on Drugs throughout Latin America and the Caribbean—and even beyond, as in Afghanistan—would be a challenging and appealing topic for further research. The War on Drugs *per se* involves several legal discussions to define the situation; moreover, PMSCs are increasingly involved in this fight, in which they provide a mix of intelligence, logistics, and training services.

In all of these complex situations in Latin America it is a fundamental to recall state obligations even though private actors, such as PMSCs, are involved:

There is no way to avoid finding the respondent State responsible for conduct in violation of human rights in the *cas d'espèce*, nor is it a matter of doing so. To attempt to do this, under the circumstances of the instant case, would involve a fruitless and *in abstracto* interpretive exercise, devoid of meaning and of juridical value. There is no way to avoid recognizing both the failings and omissions of the public State authorities regarding prevention and conclusive investigation of the violations committed in the instant case, and the support or collaboration provided, directly or indirectly, by public State authorities [these non-state actors] to the paramilitary, in committing grave violations of human rights under the American Convention. By finding the State internationally responsible [...], the Court has faithfully applied the significant provisions of the American Convention on Human Rights, which constitute the applicable law in the specific case.¹⁴⁰⁵

¹⁴⁰³ See for instance the case of the Anti-Personnel Mine Ban Convention with the support of Canada.

¹⁴⁰⁴ Phone interview with PMSC employee, Guatemala City, June 12, 2012.

¹⁴⁰⁵ Separate opinion of Judge A.A. Cançado Trindade, *Case of Mapiripán Massacre v Colombia*, *supra* note 27, II § 14.

Appendix I: Intensity of the conflict in Colombia

Several databases count the number of victims in Colombia. The official Colombian databases (*Departamento Administrativo Nacional de Estadística* (DANE, National Administrative Department of Statistics) and *Medicina Legal* (Legal Medicine) differentiate between victims of (fatalities associated with) the armed conflict and victims of (deaths from) criminal violence. This table counts victims of the armed conflict.

Database	2008	2009	2010	2011	2012
IISS	2,000	1,500	1,240	801	838
UCDP	271	425	457	202	211
PRIO	1,937				
Ploughshares	70	221	113	143	244
CERAC	1,670	1,463			
DANE	442		295	280	240
Medicina Legal	1,312		1,121	901	828
CINEP			511	334	

IISS Comments:

2013: The conflict in Colombia has remained active despite the advances of the peace negotiation in Cuba, where guerrilla and government representatives have reached agreement on rural reforms.

Source:

IISS: International Institute for Strategic Studies, <https://acd.iiss.org/en>

UCDP: Uppsala Conflict Data Program, UCDP Conflict Encyclopedia, Uppsala University www.ucdp.uu.se/database

PRIO: Peace Research Institute Oslo, <http://www.prio.no/Data/Armed-Conflict/>

Project Ploughshares, Armed Conflicts Report <http://www.ploughshares.ca/content/armed-conflicts-report-0>

CERAC : Conflict Analysis Resource Center, <http://www.cerac.org.co/en/>

DANE : Departamento Administrativo Nacional de Estadística (National Administrative Department of Statistics—Colombia), <http://dane.gov.co/index.php/es/acerca-del-dane>

Medicina Legal, <http://www.medicinalegal.gov.co>

CINEP, <http://www.cinep.org.co>

Appendix II: Intensity of the violence in Mexico

The evaluation of the intensity of violence linked to the War on Drugs is difficult to evaluate because the Mexican state does not differentiate from other types of violence. “Only IISS provides a estimate of deaths of war on drugs, but it does not report their sources.”¹⁴⁰⁶

Database	2008	2009	2010	2011	2012
IISS			15,273	12,977	12,394
UCDP	479	624	3,278	2,437	
PRG - Mexico Unido	6,837	9,614	15,273	12,903	22,485
Sistema Nacional de Seguridad Publica	13,155	16,118	20,681	22,856	21,700
UNODC	14,006	19,803	25,757	27,199	

UCDP Comment:

Since 2006, the Mexican government has aggressively targeted Mexican drug cartels using both civilian and military forces. The period between 2006 and 2011 saw a dramatic surge in the levels of non-state conflict, primarily in the form of powerful criminal cartels fighting each other for control of drug trafficking routes to the United States.

IISS Comment:

2013: There were 8,631 killings, according to the Interior Secretariat (Segob). Overall, intentional murders fell by 15% between January and June in comparison to the first half of 2012, according to the National Public Security System (SESNSP).

2012: The news website Milenio provided the first complete count for 2012, putting the number of murders related to organized crime at 12,394, surpassing 2011 by 110 homicides.

Source:

IISS International Institute for Strategic Studies: <https://acd.iiss.org/en>

UCDP: Uppsala Conflict Data Program, UCDP Conflict Encyclopedia, Uppsala University www.ucdp.uu.se/database

UNODC <http://www.unodc.org/unodc/en/data-and-analysis/homicide.html>

Sistema Nacional de Seguridad Publica, <http://www.secretariadosejecutivosnsp.gob.mx>

PRG Procuraduria General de la Republica - Mexico Unido, <http://mucd.org.mx/recursos/Contenidos/Estudiosycifras/documentos2/Seguridad%20Publica%20en%20Mexico%202006-2012%20Portal.pdf>

¹⁴⁰⁶ Interview with Matthias Novak, *supra* note 48.

Appendix III: Military capacity of armed groups

The evaluation of military capacity of armed group is a complex task. The following framework is helpful and has been used to describe the organization of armed groups in each case. The following tables illustrate the arms holding by civilians and public forces; however, it is important to keep in mind that “[c]omprehensive estimates of civilian gun ownership tend to be the most elusive where they are needed most. And there often are no easy rules to rely on.”¹⁴⁰⁷

Armed group characteristics:¹⁴⁰⁸

- (i) Origins/composition (including estimated strength);
- (ii) Leadership (both political and military) and structure;
- (iii) Areas of control/activity;
- (iv) Sources of financing/political support;
- (v) Group regulations (existence and content of group statements and internal regulations such as codes of conduct, with a particular focus on any reference to the protection of civilians and other IHL principles, use of recognizable uniforms); and
- (vi) status (i.e. dormant, splintered, defeated, active);

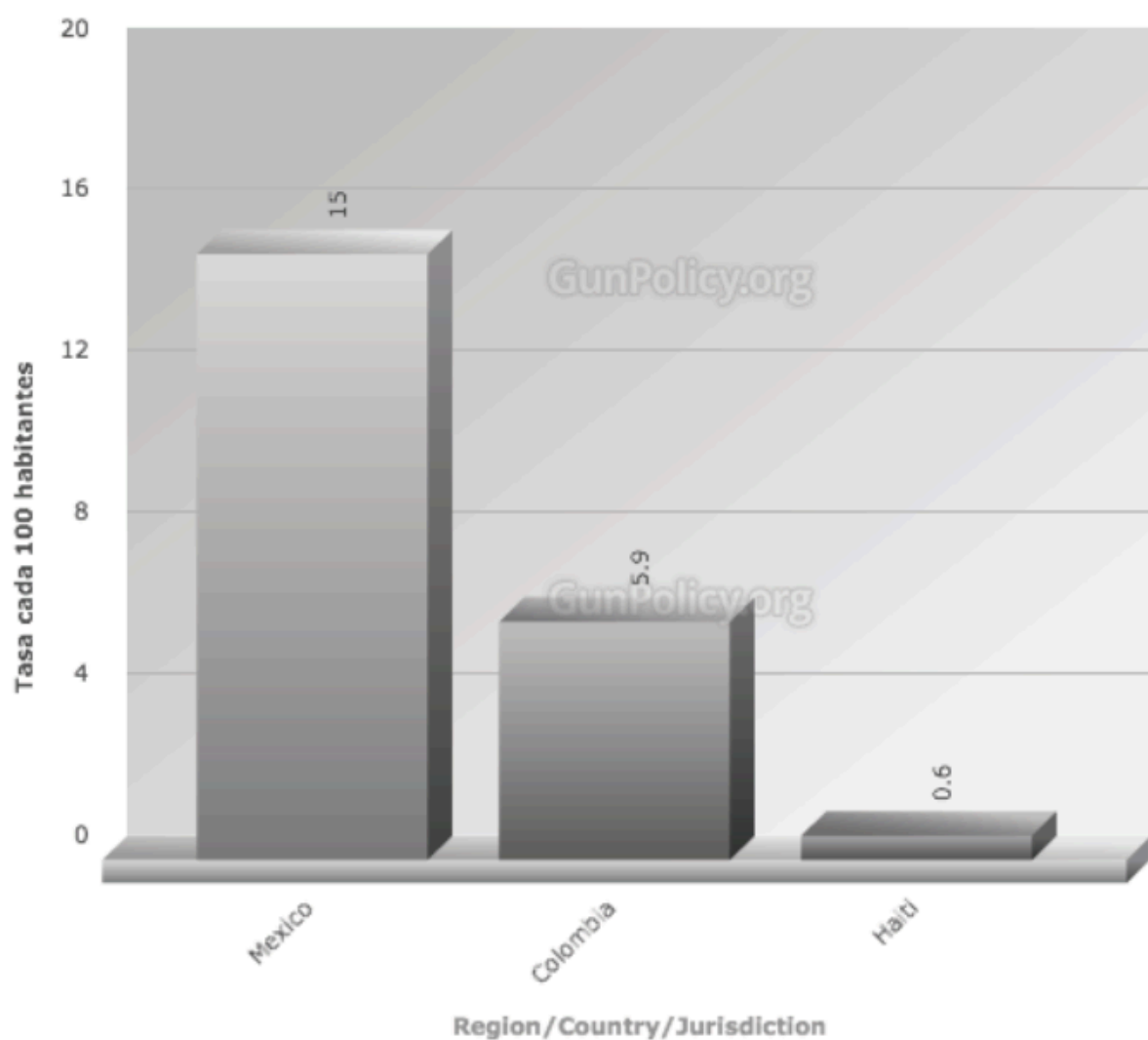
Small arms and light weapons:

- (i) Small arms holdings (both types and quantities, based on estimated group strength and weapons per combatant ratio),
- (ii) Light weapons holdings (types, and quantities if available. Any reports of possession or use of sensitive systems such as man portable air defense systems - MANPADS – or anti-tank guided weapons - ATGW - should be stressed);
- (iii) Domestic sources (including craft production, local trafficking, diversion from state, or peacekeepers, stockpiles);
- (iv) Foreign sources (suspected and documented);
- (v) Arms management (any information on the nature and extent of internal regulations and controls over the groups’ weapons, including any occurrence of unintended explosions at munitions sites controlled by the groups);
- (vi) Recovery (overview of efforts to register and/or recover the armed groups weapons, including any information on what happened to the recovered arms – destroyed, added to state inventories, stored, leaked).

¹⁴⁰⁷ Estimating Civil Owned Firearms, Research Notes: Armed Actors, Small Arms Survey, September 2011, available at http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-9.pdf.

¹⁴⁰⁸ This framework has been developed and is used by the Small Armed Survey for armed group profile. A less detailed version of this framework was published in S. M. Santos, Jr. and P. V. M. Santos, ‘Communist Party of the Philippines and its New People’s Army (CPP-NPA)’, in D. Rodriguez, (ed), *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines*, (Geneva: Small Arms Survey, Graduate Institute of International and Development Studies, 2010), 261-279. This is the 2014 framework that the Small Armed Survey uses for its forthcoming publication. Email exchange with Nicolas Florquin, Senior Researcher at the Small Arms Survey, March 2014.

Rate of Civilian Firearm Possession per 100 Population

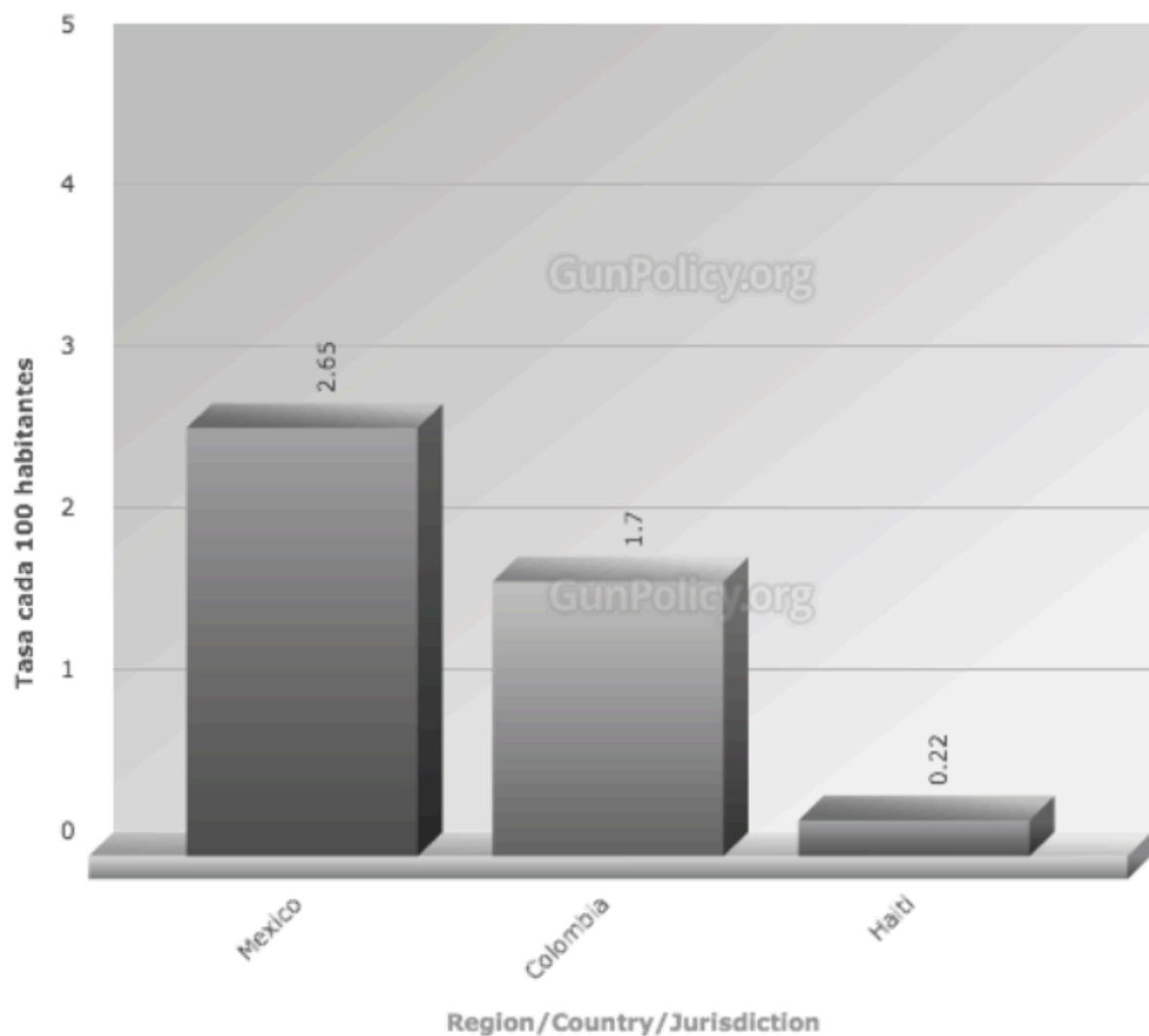


Source:

P. Alpers and M. Wilson, *Guns in Haiti: Rate of Civilian Firearm Possession per 100 Population*, Sydney School of Public Health, The University of Sydney, GunPolicy.org, (October 23, 2013), available at

http://www.gunpolicy.org/firearms/compare/78/rate_of_civilian_firearm_possession/41,113.

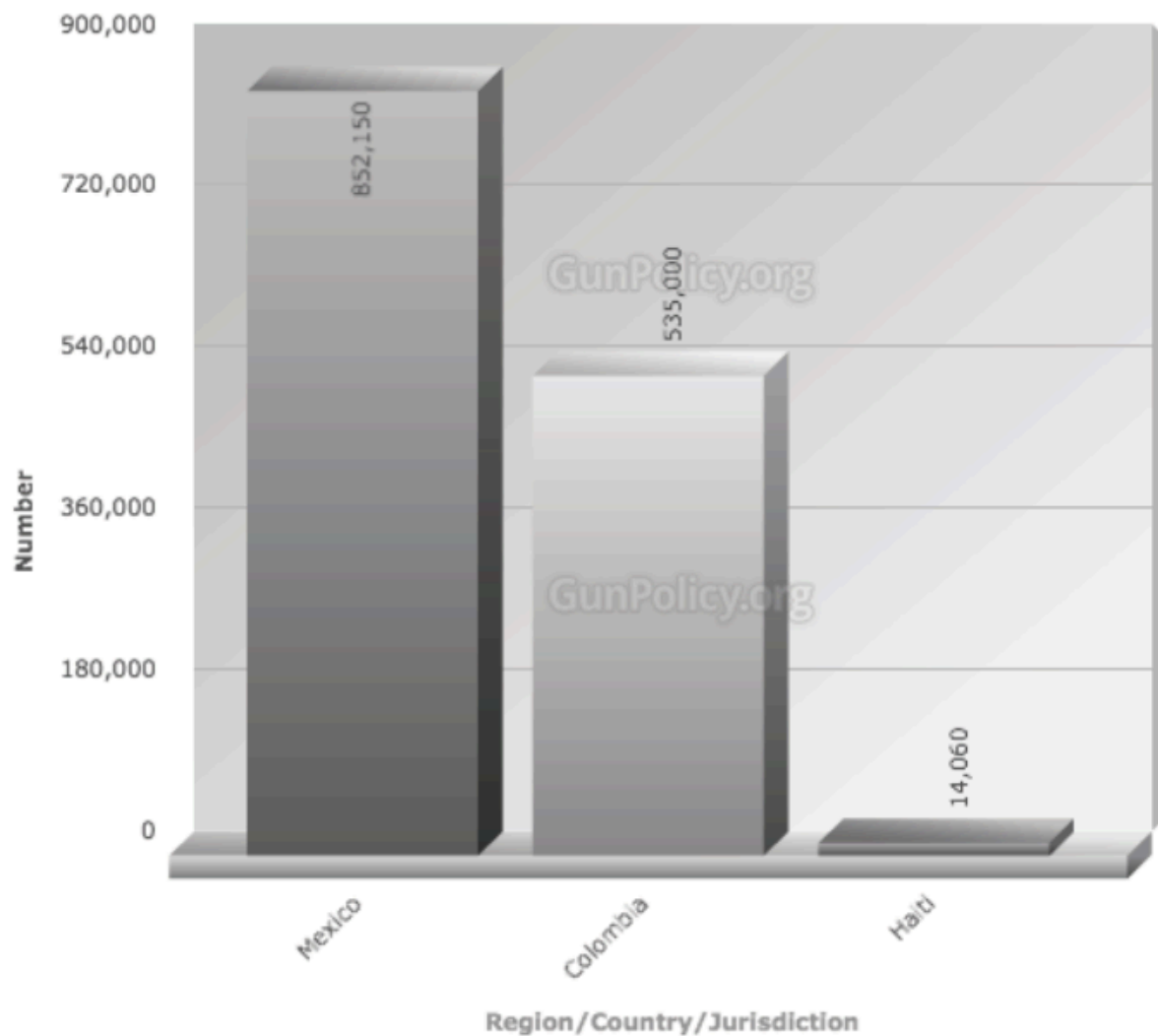
Rate of Registered Firearms per 100 Population



Source:

P. Alpers and M. Wilson, *Guns in Haiti: Rate of Registered Firearms per 100 Population* Sydney School of Public Health, The University of Sydney. GunPolicy.org, (October 23, 2013), available at http://www.gunpolicy.org/firearms/compare/78/rate_of_registered_firearms_per_100_population/41,113.

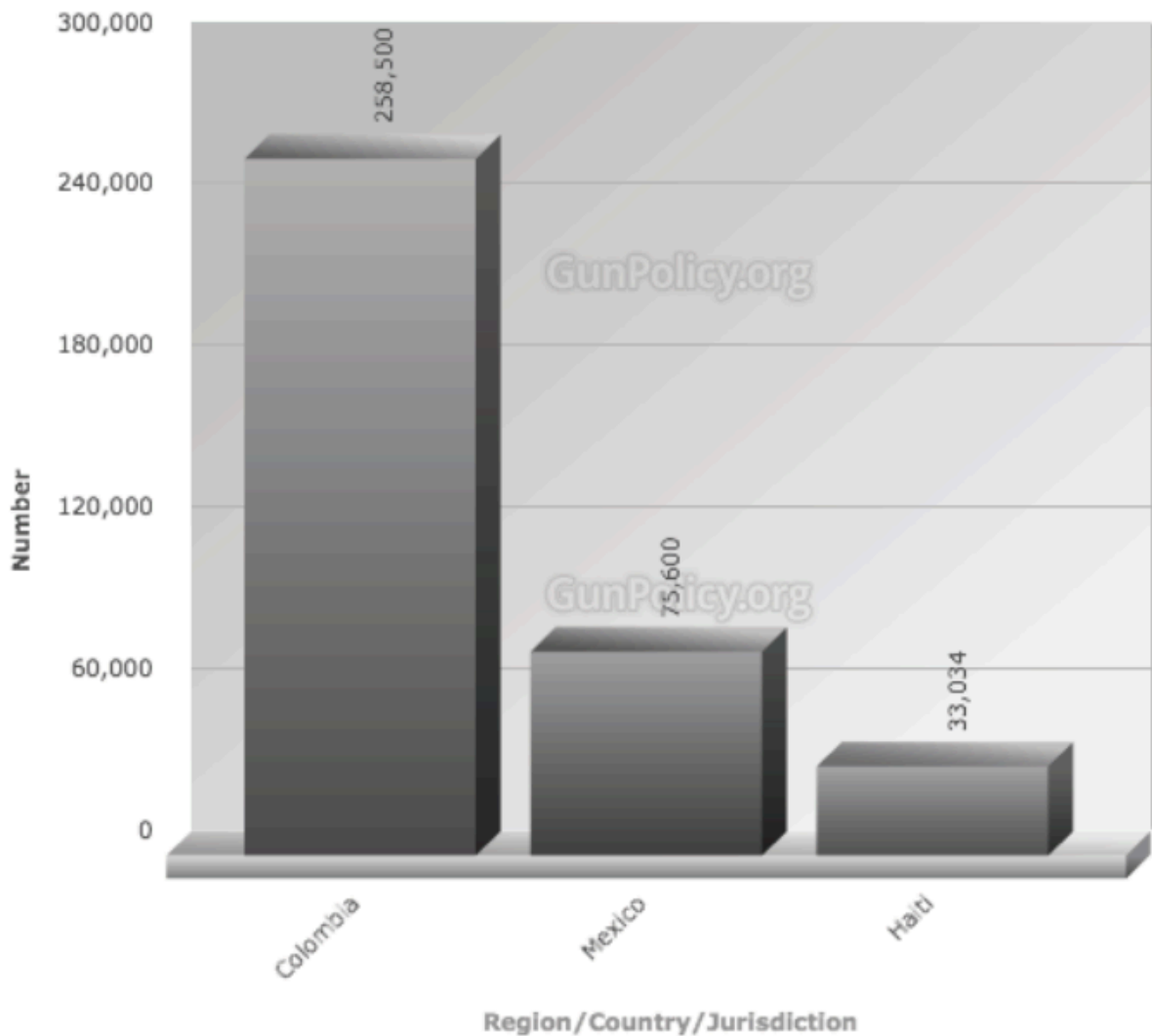
Number of Military Firearms



Source:

P. Alpers and M. Wilson, *Guns in Haiti: Number of Military Firearms* Sydney School of Public Health, The University of Sydney. GunPolicy.org, (October 23, 2013), available at http://www.gunpolicy.org/firearms/compare/78/military_firearms/41,113.

Number of Law Enforcement Firearms



Source:

P. Alpers and M. Wilson, *Guns in Haiti: Number of Law Enforcement Firearms*, Sydney School of Public Health, The University of Sydney, GunPolicy.org, (October 23, 2013), available at http://www.gunpolicy.org/firearms/compare/78/law_enforcement_firearms/41,113.

Unlawful weapons

Unlawfully held guns cannot be counted. Data are based on estimates and estimates are not always available.

Colombia

“Reports suggest that the level of firearm and ammunition smuggling in Colombia is high.”¹⁴⁰⁹
In 2009, unlawfully held guns in Colombia are estimated to be 800,000 to 2,400,000.¹⁴¹⁰

Table 9: Estimated Total Small Arms, Firearms, and Surpluses in Colombia, Rounded

		Weapons
Armed Forces	Air Force	4,000 (small arms and firearms)
	Army	445,000 (small arms and firearms)
	Navy	11,000 (small arms and firearms)
	Reserves	74,000 (small arms and firearms), 66,000 (surplus)
	Obsolescent Military	80,000? (small arms and firearms) 80,000? (surplus)
		535,000 (total)
Law Enforcement	National Police	66,000 (total), 0 (surplus)
	Other Law Enforcement	28,000 (total), 0 (surplus)
Illegal actors	AUC (paramilitaries)	unknown (total), 17,000 (surplus)*
	ELN and FARC (guerrillas)	unknown (total)

¹⁴⁰⁹ Alpers, P. and Wilson, M., *Guns in Colombia: Smuggling Guns and Ammunition*, Sydney School of Public Health, The University of Sydney, GunPolicy.org, (26 February 26, 2014) available at http://www.gunpolicy.org/firearms/compare/41/smuggling_guns_and_ammunition/113.

¹⁴¹⁰ A. Karp, *Estimated Total Small Arms, Firearms, and Surpluses in Colombia, Rounded Surplus Arms in South America: A Survey*, Small Arms Survey Working Paper 7 (August 1, 2009), at 37 (Table 9).

Civilian	Civilian Legal	706,000 (small arms and firearms)
	Civilian Illegal	800,000 - 2,400,000 (small arms and firearms)
		1,500,000 - 3,100,000 (total)
Total		Total: 2,200,000 - 3,800,000 Total Surplus: 135,000

*The AUC surplus is limited to weapons surrendered to the Colombian state.

Source:

A. Karp, Estimated Total Small Arms, Firearms, and Surpluses in Colombia, Rounded Surplus Arms in South America: A Survey, Small Arms Survey Working Paper 7 (August 1, 2009), at 37 (Table 9).

Mexico

Since 2006, 90% of the Mexican crime guns submitted for tracing originated from gun dealers in the United States.¹⁴¹¹

Estimated Total Volume of Arms Trafficked from the US to Mexico:

Period	Mid-Range	Low-End	High-End
1993	134,045 (1001,086; 161,460)	67,023 (50,543; 80,730)	200,495 (151,197; 241,501)
1994-1996	92,001 (70,440; 110,041)	46,000 (35,220; 55,020)	137,608 (105,359; 164,591)
1997-1999	87,890 (71,194; 101,718)	43,945 (35,597; 40,859)	131,460 (106,487; 426,729)
2010-2012	252,906 (213,400; 285,299)	106,700 (106,700; 142,650)	378,279 (319,188; 426,729)

Source:

T. McDougal, D. A. Shirk, R. Muggah and J. H. Patterson, *The Way of the Gun: Estimating Firearms Traffic Across the U.S.-Mexico Border*, Igarapé Institute and Trans-Border Institute (2013), available at http://catcher.sandiego.edu/items/peacestudies/way_of_the_gun.pdf.

See the discussion on the method of the estimation and the reasons to think that could be an over-estimation or a conservative estimate at 15-17.¹⁴¹²

¹⁴¹¹ U.S. Government Accountability Office, Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges, GAO-09-709 (June 18, 2009), available at <http://www.gao.gov/new.items/d09709.pdf>. According to this report, between 2004 and 2008, 87% of guns recovered and traced from Mexican crime scene crimes were originally sold by US gun dealers; between 2006 and 2008, the proportion is more than 90%. *Id.* This report relies on the metric for the number of guns recovered and traced between 2006 and 2008 because it is more consistent with the time period of trace data analyzed in this report. In Issue Brief: The Movement of Illegal Guns Across the U.S.-Mexico Border, A Report by Mayors Against Illegal Guns September 2010 available at http://www.mayorsagainstillegalguns.org/downloads/pdf/issue_brief_mexico_2010.pdf. See also W. Newell, Special Agent in Charge, Phoenix Field Division, ATF, Statement before the United States House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, March 24, 2009.

¹⁴¹² “Our estimates of numbers of firearms trafficked far exceed the total volume seized by both the Mexican or American governments combined in recent years - that is, around 5,000 and 32,300 by the U.S. and Mexican authorities respectively in 2009. The mid-range estimate implies that the combined seizures of roughly 37,000 firearms by Mexican and U.S. authorities represent roughly 14.7% (between 8.7% and 35.0%) of the weapons bought for trafficking in recent years.” In T. McDougal, D. A. Shirk, R. Muggah and J. H. Patterson, *The Way of the Gun: Estimating Firearms Traffic Across the U.S.-Mexico Border*, Igarapé Institute and Trans-Border Institute (2013), available at http://catcher.sandiego.edu/items/peacestudies/way_of_the_gun.pdf.

Haiti

Estimates of unlawful weapons in Haiti are even less reliable than for Colombia or Mexico. The most precise information found is from 2005.¹⁴¹³

	Group	Estimated numbers	Multiplier	Est. weapons
Non-state military	Revolutionary Front of the North	500-1,000	0.5-1	250-1,000
	Ex-USGPN (presidential guard)	700	2	1400
	Ex-FADH	1,500-2000	0.5-1	750-2,000
Non-state political	Ops, including vigilance brigades	2,000 (10-50 members per OP)	0.5	1,000
	Pro-oppositions groups	--	0.5	--
	Self-defence bourgeois militia	200-300	1,5	300-450
Non-state criminal	Baz armés (criminal gangs)	2,000 (10-30 per baz)	0.5	1,000
	Organized criminal gang (including drug traffickers)	--	0.5	--
	Zenglendos (petty criminals)	--	0.5	--
	Prison escapees	1,500	0.2	300
Non-states other	Private Security company personnel	6,000	1	6,000
Non-state total				11,000 – 13,150

Source:

R. Muggah, *Securing Haiti's Transition: Reviewing Human Insecurity and the Prospects for Disarmament, Demobilization, and Reintegration*, Small Arms Survey Occasional Paper 14, October 2005, available at <http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP14-Haiti-EN.pdf>.

¹⁴¹³ See also C. Fitzpatrick, *The Economics of Small Arms Demand: Polarization and Rent-seeking in Haiti and Latin America*, Bonn International Center for Conversion paper n°51, at 20, available at http://www.bicc.de/uploads/tx_bicctools/paper51.pdf.

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